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In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the standard established in *Buckley* v. *Valeo*, 424 U.S. 1, 60-74 (1976), by exempting Respondents from the statutory requirement that they report the names and addresses of contributors of more than $200, without inquiry into whether or not there was any evidence of recent threats or harassment directed against the Communist Party's supporters.

2. Whether a political committee can be relieved from complying with the statutory requirement that it keep records of its contributors, even though such records are not subject to public disclosure.*

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* The only named party to this case not reflected in the caption is Frances Bordofsky.

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OCTOBER TERM, 1981

No. 81-

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Federal Election Commission ("FEC" or "Commission") respectfully petitions this Court for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case, and to set it for hearing with *Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776, *prob. juris. noted*, ___ U.S. ___, 102 S. Ct. 968 (Dec. 14, 1981) which also presents the issue of the proper standard of proof under *Buckley* v. *Valeo*, 424 U.S. 1 (1976), with respect to a comparable state campaign reporting statute. The separate issue presented here, whether a political committee can be relieved from complying with the Federal Election Campaign Act's recordkeeping provision, is not involved in *Brown*, and independently merits this Court's consideration.

OPINIONS BELOW

The decision of the court of appeals is published at 678 F.2d 416, and appears in Appendix ("App.") A at 1a-17a.

The court of appeals' judgement appears in App. B at 18a-19a. The decision of the United States District Court for the Southern District of New York is published at 524 F. Supp. 955, and appears in App. C at 20a-33a.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1982. App. B. Jurisdiction is conferred by 2 U.S.C. § 437g(a)(9) and 28 U.S.C. § 1254(1)(1980).

STATUTES INVOLVED

This case concerns provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* ("FECA" or "the Act")[1], particularly 2 U.S.C. §§ 432 and 434. For the Court's convenience, these provisions are set forth in App. D at 34a-56a.

STATEMENT OF THE CASE

Background

Sections 432 and 434 of the Federal Election Campaign Act require detailed reporting and recordkeeping by political committees and federal candidates of all contributions and expenditures. In particular, 2 U.S.C. § 434(b)(3)(A) requires political committees to file reports with the Commission, for disclosure to the public, containing, *inter alia*, the name and address of any person

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[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976), by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977), and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980).

who contributes a total of more than $200 in any year to the committee. In addition, 2 U.S.C. § 432(c),(d) requires the treasurer of each political committee to maintain, for three years, records containing, *inter alia*, the name and address of any person who contributes more than $50 to the committee. Although the records maintained under § 432(c) are subject to possible audit by the Commission, they are not routinely reported to the Commission, and the Act does not authorize disclosure of these records to the public.[2]

Gus Hall and Jarvis Tyner, the Communist Party's candidates for president and vice-president in 1976, had four authorized campaign committees. The Hall-Tyner Election Campaign Committee ("the Committee") was designated as their principal campaign committee; Frances Bordofsky was its treasurer, and was thus responsible for complying with the reporting and disclosure provisions of the Act. *See* 2 U.S.C. § 432(c).

Bordofsky informed potential contributors, at the time she solicited them for contributions, that she would neither report nor record their names if they desired to contribute anonymously. As a result of this policy, Bordofsky reported to the Commission the names of 76 contributors who indicated they did not desire confidential treatment and reported 433 contributors as anonymous. The other

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[2] The Act was amended in 1979, resulting in a renumbering of some of the provisions at issue here. The only relevant substantive change was that, prior to 1979 all contributors of more than $100 had to be reported, while now only contributors of more than $200 must be reported. For the Court's convenience, the pre-amendment versions of 2 U.S.C. §§ 432 and 434 are set out at App. 34a-42a, and the post-amendment versions at App. 43a-56a. Unless otherwise indicated, citations in this brief are to the current provisions of the statute.

three authorized committees reported the names of 195 contributors and reported a total of 60 contributors as anonymous. Bordofsky also failed to keep any record of contributors who requested to have their identities remain confidential.

Upon the foregoing facts, the Commission found reason to believe that Bordofsky and the Committee violated former 2 U.S.C. § 434(b)(2) by failing to file reports with the Commission which disclosed information about contributors of more than $100, and violated 2 U.S.C. § 432(c) by Bordofsky's failure to maintain records of information about contributors of more than $50. The Committee contended that it should not be required to report the names of its contributors because of the possibility that they would be harassed, but the Commission concluded that the Committee had not supported this contention with the type of evidence required to satisfy the standard for obtaining such relief established in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). After conciliation proved unsuccessful, the Commission found probable cause to believe that the Committee and Bordofsky had violated former 2 U.S.C. §§ 434(b)(2) and 432(c) and authorized the filing of a civil enforcement action.

Proceedings in the District Court

On August 1, 1978, the Commission filed its complaint in this case pursuant to former 2 U.S.C. § 437g(a)(5)(B), seeking a civil penalty and an injunction against further violation of the reporting and recordkeeping provisions by the Committee and Bordofsky. The Committee's answer admitted that it failed to disclose contributor information as required by former 2 U.S.C. § 434(b)(2) and that Bordofsky had failed to comply with the recordkeeping requirements set forth at 2 U.S.C. § 432(c). However, as a defense, the Committee again asserted

that it could not constitutionally be required to comply with those statutory provisions because disclosure of the names of the Committee's contributors would subject them to threats and harassment. The Committee relied upon the following evidence to support this assertion:

(1) an affidavit from Bordofsky asserting that most of the people solicited for contributions would not contribute unless they were assured anonymity, and affidavits of twelve persons who stated that they made cash contributions to the Committee in 1976 only with the assurance that their identities would not be reported or recorded, because they feared adverse consequences if their support of the Committee became known. These affidavits were submitted to the district court under seal, and copies were supplied to counsel for the Commission only after the signatures and all other identifying information were deleted.

(2) the Committee counsel's interpretation of the FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. Rep. No. 755, 94th Cong., 2d Sess. (1976) ("the *Senate Report*"), in which a Senate committee found that a variety of unlawful harassment techniques had been utilized by certain agencies of the federal government against a wide variety of dissident and mainstream organizations spanning the political spectrum, including the Communist Party. The *Senate Report* found that this harassment program, known as COINTELPRO, was in effect during the 1950's and 1960's and was discontinued in 1971.

(3) an affidavit from the Assistant Director of the Intelligence Division of the FBI stating that the Communist Party is currently the subject of an FBI foreign intelligence investigation, which is being conducted in full

compliance with all applicable laws and executive guidelines.[3]

(4) a list of statutes enacted during the 1950's which assertedly could be used against members of the Communist Party.

On September 22, 1981, the district court granted summary judgment in favor of the Committee. With regard to the reporting requirement, the court found that it need inquire no further than the evidence of harassment and hostility toward supporters of the Communist Party during the 1950's and 1960's, coupled with the FBI's statement that the Party is currently subject to a lawful foreign intelligence investigation. The court concluded that no other evidence was necessary to establish "as a matter of law 'a reasonable probability that the compelled disclosure of . . . contributors' names will subject them to threats, harassment, or reprisal from either government officials of private parties," App. 29a, *citing Buckley* v. *Valeo*, 424 U.S. at 74. The court expressly rejected the Commission's contention that, in order to satisfy the *Buckley* standard requiring a current "reasonable probability" of harassment, it was necessary to determine whether harassment of Party supporters has continued. Rather, the court found that a lawful FBI investigation

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[3] This affidavit was submitted as part of the FBI's response to a discovery subpoena served on it by the Committee, requesting, *inter alia*, all of the FBI's files relating to the Communist Party since 1936. App. 27a n.9. The FBI moved to quash this subpoena as overly broad and burdensome, and the Committee agreed to limit its request to all such records from 1972 to the present. The FBI still objected to this, and proposed to search its files for any evidence of harassment or other unlawful activity directed against the Party and any individual named by the Committee, from 1976 to the present. The Party made no response to this offer, and the district court refused to resolve this discovery dispute. App. 21a n.2.

which has not involved any harassment is sufficient to meet this standard.

With regard to the recordkeeping requirement, the district court held that although "FECA does not authorize the disclosure of those records to the public," the FBI's ongoing investigation of the Communist Party made it reasonable to assume "that the FBI would discover [contributors'] identit[ies] through the use of informants or other investigative techniques, if their names were recorded in records maintained by the Committee." App. 31a. The court recognized that relieving the Committee of its obligation to maintain records of contributors would effectively immunize the Committee and its contributors from enforcement of FECA's contribution limitations, but found no significant governmental interest would be served by such enforcement. App. 32a-33a.

Proceedings in the Court of Appeals

The court of appeals affirmed the judgment of the district court. Noting that the Committee had submitted affidavits from several anonymous contributors asserting that they feared disclosure, the court concluded that its task was to determine whether that fear was real. "When fear of injury that is neither imaginery [sic] nor speculative discourages the exercise of valued and revered First Amendment rights, courts must intercede." App. 15a. The court brushed aside the Commission's contention that in order to determine whether there is a "reasonable probability" of harassment of contributors, as required by *Buckley*, it was necessary for the court to determine whether the Party's many public supporters have been subject to more recent harassment. Rather, it found that the "test given us by the Supreme Court is that we need only find a 'pattern of threats or specific manifestations of public hostility. . . .' " App. 15a, *citing Buckley* v. *Valeo*, 424 U.S. at 74.

The court concluded that the evidence in the record "amply meets this standard . . . ." App. 16a. The court primarily relied upon the *Senate Report* and the list of statutes. Although it acknowledged that COINTELPRO was terminated in 1971, the court concluded that the FBI's acknowledgement that it is today conducting a lawful foreign intelligence investigation of the Party "merits substantial weight." App. 15a. While conceding that the statutes "may currently lie dormant," the court nevertheless found them to be an "ever-present threat of reprisal" because "it is not inconceivable that a statute long ignored may suddenly be resurrected. . . ." App. 13a-14a. The court also found that the Communist Party was entitled to an exemption from the Act's recordkeeping requirements, because of the possibility that contributors' identities might be revealed to the Commission if it conducted an audit of the Committee's records. App. 16a. The court concluded by criticizing the Commission's effort to enforce the statute evenhandedly as evidencing "an appalling disregard for the needs of the free and open political process safeguarded by the First Amendment." App. 17a.

REASONS WHY THE WRIT SHOULD ISSUE

I. THE COURT OF APPEALS HAS MISAPPLIED THIS COURT'S DECISION IN *BUCKLEY* v. *VALEO*, IN A MANNER WHICH WILL SERIOUSLY UNDERMINE THE EFFECTIVENESS OF THE ACT'S CAMPAIGN DISCLOSURE PROVISIONS

In *Buckley* v. *Valeo*, 424 U.S. 1, 60-74 (1976), this Court upheld the constitutionality of the Act's reporting requirement, even as applied to minor parties and independent candidates. This Court held that an exemption from these important provisions could only be permitted if a party or candidate demonstrated, on the basis of

record evidence, "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." 424 U.S. at 74.

On December 14, 1981, this Court noted probable jurisdiction in *Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776, in which a minor party was granted an exemption from a state statute requiring candidates to report the names of virtually all contributors. The lower court's decision in *Brown* was based on evidence presented by the party of actual incidents, continuing up to the time of trial, in which its supporters had been fired from jobs, assaulted, threatened and subjected to violence. The question which this Court has agreed to review in *Brown* is whether there was sufficient evidence of this type in the record of that case to satisfy the evidentiary burden outlined in *Buckley*. This Court agreed to review that case in response to the state's argument that the record evidence only showed "isolated instances of harassment directed toward the organization or its members within Ohio during recent years." *Brown*, Juris. Statement, Question Presented.

This case presents the same issue as *Brown*—what is the type and quantum of evidence necessary to satisfy the standard outlined in *Buckley* for an exemption from reporting the names of campaign contributors—but in a context even more deserving of this Court's consideration. For the court of appeals in this case granted an exemption from the reporting requirement on a record which contains no evidence at all that either the Communist Party or any of its supporters had been subjected to a single incident of threat or harassment for at least a decade prior to the court's decision. In addition, this case involves a federal statute applicable throughout the

United States which, unlike the Ohio statute in *Brown*, permits individuals to contribute up to $200 without having their names disclosed.

The Commission submits that this Court should not resolve the question of the appropriate evidentiary standard under *Buckley*, which is presented in *Brown*, without taking into consideration the even more compelling circumstances presented here. This question is vitally important to the successful administration of the Act. If the relaxed standard adopted by the court of appeals in this case is permitted to stand, the Commission anticipates that other minor parties and candidates may be able to qualify for exemption from the Act's disclosure provisions. This would deprive the electorate of access to the information which Congress has determined it should have in assessing federal candidates, and thus diminish public confidence in the integrity of the federal election process.

A. The Disclosure Requirements Further Compelling Governmental Interests Without Undue Infringement of Associational Rights

In *Buckley* v. *Valeo*, 424 U.S. at 60-74, this Court reviewed challenges to the reporting provisions of FECA and concluded that, despite the acknowledged deterrent effect those provisions have on potential contributors, it is not unconstitutional to require even minor parties to comply with them, because they serve three particularly compelling governmental interests:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . .
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by

> exposing large contributions and expenditures to the light of publicity. . . .
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations.

424 U.S. at 66-68. (footnotes omitted). The Court concluded that these governmental interests are of the same magnitude as the interests which had been held to justify requiring the Communist Party to register the names of its members in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961). *Buckley* v. *Valeo*, 424 U.S. at 66. Thus, the Court upheld the reporting provisions as "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68. *See also Citizens Against Rent Control* v. *City of Berkeley*, ___ U.S. ___, 102 S. Ct. 434, 439 and 441 (Blackmun and O'Connor, JJ., concurring) (Dec. 14, 1981).

The court of appeals in this case nevertheless held that, as applied to the Committee, there was a "relatively insignificant interest in disclosure." App. 16a. This holding, apparently based upon the court's opinion that the Communist Party is unlikely to win an election (*see also* App. 30a), completely disregards the important role minor parties play in elections. As this Court found in *Buckley* v. *Valeo*, 424 U.S. at 70, "a minor party sometimes can play a significant role in an election. Even when a minor party candidate has little or no chance of winning, he may be encouraged by major party interests in order to divert votes from other major party contenders." The court of appeals in *Buckley* also observed that "[m]inority and independent candidacies have a real impact on the election process that cannot be measured by tallied votes alone. They can affect election outcomes by diverting

votes from better supported candidates as well as by occasionally winning the contested office." *Buckley* v. *Valeo*, 519 F.2d 821, 867 (D.C. Cir. 1975) (en banc).[4]

Indeed, in the very election involved in this case, the Committee's candidates demonstrated how a minor party can play the role of "a 'spoiler' for major party interests, diverting votes from one major candidate and thus playing a significant role in an election." *Oregon Socialist Workers 1974 Campaign Committee* v. *Paulus*, 432 F.Supp. 1255, 1260 (D. Ore. 1977) (three-judge court). In the 1976 presidential election in Ohio, Hall and Tyner drew almost 8,000 votes in an election decided by just over 9,000 votes. The Committee's candidates thus virtually held the balance of power in Ohio, and a shift of Ohio's 25 electoral votes to the other party would have come close to changing the result of the election. There is clearly a substantial governmental interest in ensuring that the members of the electorate who cast their votes for Gus Hall had available the financial information on which to evaluate properly all of the candidates' campaigns.[5]

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[4] There is also the problem of appearances—the possibility of citizen anxiety stemming from keeping part of the process secret, engendering the suspicion that what is not accounted for has some connection with undue influence on those elected. Thus omission of minority parties from a general disclosure scheme could seriously undercut the Act's objective of enabling the voting public to consider the identity, concerns, and interests of those whose contributions fund the campaigns aimed at their votes.

Doe v. *Martin*, 404 F. Supp. 753, 757-758 (D.D.C. 1975) (three-judge court).

[5] Although presented with no evidence on the point, the courts below apparently assumed that voters can adequately evaluate Communist Party candidates without knowing who is funding their cam-

The Act's reporting provision not only serves important governmental interests, but is carefully drafted to accommodate the interest of individuals in confidentially supporting the candidate of their choice. Thus, the Act only requires reporting of contributors of a total of more than $200,[6] so that supporters of the Communist Party can associate with the Party without disclosure through the constitutionally protected "symbolic act of contributing," which does not depend upon the size of the contribution.[7] *Buckley* v. *Valeo*, 424 U.S. at 21, *quoted in California Medical Ass'n.* v. *FEC*, 453 U.S. 182, 196 n.16 (1981). While the Act does not permit unlimited contributions to the Committee without disclosure, "the First Amendment rights of a contributor are not infringed by

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paigns. While the Communist Party's public position on many issues might be relatively clear, revelation of its source of funding could indicate that its real interests lie elsewhere. As this Court stated in *Schneiderman* v. *United States*, 320 U.S. 118, 154-155 (1943):

> [W]e would deny our experience as men if we did not recognize that official party programs are unfortunately often opportunistic devices as much honored in the breach as in the observance. On the basis of the present record we cannot say that the Communist Party is so different in this respect that its principles stand forth with perfect clarity. . . .

No evidence was presented in this case which would alter that conclusion.

[6] A political committee's treasurer must aggregate all contributions received from each person and report the name of any person whose total contributions to the committee exceed $200 in one year. 2 U.S.C. §§ 432(c) and 434(b).

[7] In addition, volunteer services rendered to a candidate by individuals during the course of a campaign are, by definition, not "contributions" or "expenditures," and thus need not be reported. *See* 2 U.S.C. § 431(8)(B), (9) (B).

limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate. . . ." *California Medical Ass'n.* v. *FEC*, 453 U.S. at 197.

> The validity of the governmental approach . . . is enhanced by permitting contributions below a cutoff point to be made and received without disclosure, a provision that covers a large percentage of political contributors, gives some privacy to the individual who wishes to participate and some elbow room for the party to get contributions even from those concerned with privacy.

Doe v. *Martin*, 404 F. Supp. at 761. *See also*, *United States* v. *Finance Committee to Re-Elect the President*, 507 F.2d 1194, 1200 (D.C. Cir. 1974); *Buckley* v. *Valeo*, 519 F.2d at 867 n.119.[8]

B. The Court of Appeals Misapplied the *Buckley* Standard When It Exempted the Committee From Disclosure Under FECA

This Court recognized in *Buckley* that the governmental interests in disclosure of contributors are not the same with respect to minor parties as with major parties, and that the deterrent effect of disclosure on potential contributors to minor parties could be greater than on contributors to major parties. 424 U.S. at 70, 74. However, even though it was presented with the expert opinions of individuals experienced in political activities that potential contributors would be deterred from contributing to minor parties for fear of disclosure, supported by evidence that some potential contributors actually had re-

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[8] In contrast, the statute challenged in *Brown* v. *Socialist Workers '74 Campaign Committee* requires that every political contribution be disclosed with the exception of a contribution of $25 or less made at a fundraising event. *See* Ohio Revised Code, §§ 3517.10, 3517.11.

fused to contribute to minor parties for fear of disclosure, the Court concluded that "the substantial public interest in disclosure . . . outweighs the harm [to minor parties] generally alleged." 424 U.S. at 72.

This Court thus refused to permit an exemption from the statute based upon subjective fear of disclosure and stated that an exemption could not be granted unless, in a future case, a proper evidentiary record demonstrated that public disclosure of contributors to a particular party was likely to result in harassment or reprisals:

> There could well be a case, similar to those before the Court in *NAACP* v. *Alabama* [357 U.S. 449 (1958)] and *Bates* [v. *City of Little Rock*, 361 U.S. 516 (1960)] where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied.

424 U.S. at 71. This Court held that the record evidence in such a case would have to demonstrate "a *reasonable probability* that the compelled disclosure of a party's contributors' names *will* subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74 (emphasis added).

In response to the general argument that in many circumstances it would be difficult for a party to prove the probability of harassment, because it would be unable to obtain testimony from individuals who were afraid of being publicly identified with the party, this Court noted in *dicta* that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim." This Court suggested several types of evidence which might be probative of the probability of harassment:

> The proof may include, for example, specific evidence of past or present harassment of members due

> to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.

424 U.S. at 74. However, the Court explicitly rejected the argument that the probability of harassment is not susceptible to formal proof, concluding that "[w]here it exists the type of chill and harassment identified in *NAACP* v. *Alabama* can be shown." *Id.* at 74.[9]

The court of appeals in this case departed from the standard set out in *Buckley* by deciding that a political party's campaign committee should be granted an exemption from the Act's central campaign disclosure provisions if it has *ever* been subjected to harassment, without even inquiring into whether current circumstances indicate that a "reasonable probability" of harassment still exists. This is the first case in which any court has granted an exemption from a campaign reporting statute under *Buckley* without requiring evidence that harassment of a party's supporters is still going on.[10] The court's

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[9] In *NAACP* v. *Alabama*, 357 U.S. at 462, the petitioner "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." Moreover, the state was unable to show that the disclosure it sought had a "substantial bearing" on the issues it sought to clarify. *Id.* at 464.

[10] In *Brown* v. *Socialist Workers '74 Campaign Committee*, the lower court found that, continuing almost up to the time of the trial, party members were discharged by their employers and subjected to vandalism, threats and harassing telephone calls; and that the party's Chicago headquarters had recently been burglarized. *See also 1980 Illinois Socialist Workers Campaign* v. *Illinois Board of Elections*, No. 81-C-1919 (N.D. Ill. Nov. 30, 1981), *appeal docketed*, No. 82-

willingness to grant an exemption based on the abstract observation that "it is not inconceivable," App. 13a-14a, that practices which have long been abandoned could be resumed, effectively immunizes a party from complying with this important federal statute forever, even when there is no longer a "reasonable probability" that disclosure "will" subject its contributors to harassment. This was clearly not the result contemplated in *Buckley*, and if allowed to stand it will make serious inroads on the effectiveness of the uniform disclosure provisions in combating election ignorance and corruption. For there are many domestic groups of all political persuasions who were subject to harassment during the 1950's and 1960's as targets of COINTELPRO, and a "zealous prosecutor," App. 14a n.15, would have little trouble finding statutes which could be used to harass any group he or she disliked. *See, e.g., O'Shea* v. *Littleton*, 414 U.S. 488 (1974).

1312 (7th Cir. Feb. 26, 1982) ("Specific acts of violence against the SWP, including the firebombing of their Chicago office, theft of records, and threatening telephone calls to SWP members, are detailed through at least 1978." (slip op. at 7)); *Wisconsin Socialist Workers 1976 Campaign Committee* v. *McCann*, 433 F. Supp. 540, 547 (E.D. Wisc. 1977) (three-judge court) (party members harassed by local police and members of the Nazi party). *Compare Oregon Socialist Workers 1974 Campaign Committee* v. *Paulus*, 432 F. Supp. 1255 (D. Ore. 1977) (three-judge court) (exemption from reporting denied even though there was evidence that party members had received harassing telephone calls). In *Socialist Workers 1974 National Campaign Committee* v. *FEC*, No. 74-1338 (D.D.C. Jan. 2, 1979) (three-judge court), the Commission entered into a consent order granting the party a temporary exemption from the Act's reporting provision through the 1984 elections, after the party submitted 12 volumes of evidence which demonstrated numerous incidents of harassment of party supporters.

The granting of summary judgment to the Committee by the courts below,[11] without inquiring into whether its supporters are currently subject to harassment, cannot be justified in terms of the suggestion in *Buckley* that, when necessary, minor parties must be allowed "sufficient flexibility in the proof of injury to assure a fair consideration of their claim." *Buckley* v. *Valeo*, 424 U.S. at 74. For the Committee had access to ample evidence of ongoing harassment of its supporters, if it exists. Thus, from 1976 to 1979, the Party's four campaign committees reported to the Commission for public dissemination the names of 271 contributors to the 1976 Hall-Tyner campaign, more than a third of their total contributors; yet the courts below found it unnecessary to inquire into whether any of them suffered any adverse consequences as a result. There are many publicly active Communist Party members and supporters who, like Gus Hall, Jarvis Tyner and Frances Bordofsky, have made no secret of their association with the Party; yet, in contrast to *Brown* v. *Socialist Workers '74 Campaign Committee*, the courts below found it unnecessary to determine whether even these prominent Party activists have been harassed

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[11] Unlike *Brown*, in which the lower court's factual determinations were based on a trial record, the decision in this case was a summary judgment. In reviewing a summary judgment, " 'the inferences to be drawn from the underlying facts contained . . . in the affidavits, attached exhibits, and depositions submitted below . . . must be viewed in the light most favorable to the party opposing the motion.' " *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, ___ U.S. ___, 102 S.Ct. 2799, 2806 (June 25, 1982), *quoting United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). Accordingly, this Court owes no deference to the lower courts' factual conclusions, and should view all of the evidence, and draw all permissible inferences, in the light most favorable to the Commission.

or threatened in any way since COINTELPRO was discontinued in 1971. This was serious error, for if none of these many prominent and active Party supporters have suffered any adverse consequences from their public support of the Party in more than a decade, there cannot be a "reasonable probability" that individuals who have merely contributed to the Party's presidential campaign committee will be subjected to such harassment.

This fatal flaw undermines the value of all of the evidence relied upon by the courts below. If none of the statutes cited by the court of appeals, App. 12a-13a, have been invoked against the Party's active public supporters in recent times, there is not a "reasonable probability" that they will be used against individuals who have merely contributed to the Party's presidential campaign. And if none of the Party's public and active supporters have been subjected to a single instance of harassment by the FBI or anyone else since COINTELPRO was terminated in 1971, there is no "reasonable probability" that the FBI will engage in such activity against individuals who have merely contributed money to the Party's electoral efforts.[12]

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[12] Seen in this light, the evidence relied upon by the lower courts to grant summary judgment to the Committee (see n. 11, p. 17, *supra*) shows, at most, that a Senate committee concluded that supporters of the Communist Party, along with hundreds of thousands of other Americans of all political persuasions, were subjected to harassment by certain government agencies in the 1950's and 1960's as part of a program discontinued in 1971; that the FBI is currently investigating the Communist Party in an entirely lawful manner, and is no longer engaged in unlawful harassment or reprisals; that a number of statutes were enacted during the 1950's which might subject members of the Communist Party to liability, but that many of these statutes were declared unconstitutional long ago and none of them have been

In sum, the court of appeals' decision represents a serious departure from the standard recognized in *Buckley*, which could undermine the effectiveness of the Act in maintaining public confidence in the integrity of federal elections. This is an important issue of nationwide import, which merits this Court's consideration.

II. THE COURT OF APPEALS' DECISION TO GRANT AN EXEMPTION FROM THE ACT'S RECORDKEEPING REQUIREMENT IS CONTRARY TO *BUCKLEY* v. *VALEO* AND OTHER DECISIONS OF THIS COURT

The court of appeals' decision to exempt the Committee from the Act's provision requiring maintenance of contribution records, even though there has been no request for disclosure of those records, is completely unprecedented. Nothing in this Court's opinion in *Buckley* suggests that the standard established for granting an exemption from the reporting provision could also apply to the Act's recordkeeping provision. To the contrary, as we show below, in *Buckley* this Court declined to address first amendment objections to the recordkeeping provision in advance of an attempt to compel disclosure of the records. Exempting a political committee from the recordkeeping requirements effectively immunizes it as well from being required to comply with all of the Act's provi-

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invoked against anyone in many years; and that several individuals have expressed the sort of subjective fear of disclosure which this Court found insufficient to justify an exemption in *Buckley*. The lower court's lack of concern about the absence of evidence that the earlier harassment and hostility it noted is still continuing violates the time honored doctrine that "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse . . . Silence then becomes evidence of the most convincing character." *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939) (citations omitted).

sions regulating political contributions. Accordingly, this issue independently merits review by this Court, whether or not the Court also agrees to review the lower court's treatment of the reporting provisions.

This Court has consistently held that statutes which merely provide for maintenance of records about individuals cannot be challenged as an infringement upon associational privacy until such time as disclosure of the records is sought.

> This Court has recognized that an organization may have standing to assert that constitutional rights of its members be protected from governmentally compelled disclosure of their membership in the organization, and that absent a countervailing governmental interest, such information may not be compelled. *NAACP* v. *Alabama*, 357 U.S. 449 (1958) . . . Each of [those cases] was litigated after a subpoena or summons had already been served for the records of the organization, and an action brought by the organization to prevent the actual disclosure of the records. No such disclosure has been sought by the Government here, and the ACLU's challenge is therefore premature.

California Bankers Ass'n. v. *Shultz*, 416 U.S. 21, 55-56 (1974) (citations and footnotes omitted). *See also Laird* v. *Tatum*, 408 U.S. 1, 12-14 (1972); *Whalen* v. *Roe*, 429 U.S. 589, 601-602 (1977); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 79-81 (1976). The *en banc* court of appeals in *Buckley* v. *Valeo*, 519 F.2d at 864-865, applied this rule and held that the recordkeeping provisions of the FECA are not subject to a first amendment challenge in advance of an attempt to compel disclosure of them:

> [T]he confidential status of those records precludes any claim of real or threatened injury to plaintiffs' First Amendment interests arising from public dis-

> closure . . . The point of audit [by the Commission] is soon enough to raise specific issues about the constitutionality of the audit provisions.

519 F.2d at 865.[13] This Court expressly agreed with the court of appeals' conclusion, citing *California Bankers Ass'n.* v. *Shultz, supra. Buckley* v. *Valeo,* 424 U.S. at 84.

Ignoring this settled rule of law, and the specific holding of *Buckley,* the court of appeals in this case exempted the Committee from the Act's recordkeeping requirement because of "the likelihood of eventual review and oversight by the Government [*i.e.*, the Commission]." App. 16a. The court of appeals' decision to invalidate the requirement that the Committee maintain records of its contributors, when there has not yet been any attempt to compel disclosure of those records, clearly conflicts with the holding in *Buckley,* and thus merits review by this Court.[14]

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[13] Even Chief Judge Bazelon, who vigorously dissented from the court's holding that the Act's reporting provision was constitutional as applied to minor parties, agreed that the recordkeeping and audit provisions could not be challenged until disclosure of the records is sought:

> [A] party seeking relief must establish that disclosure is being compelled; the mere possibility that it will be required in the future is insufficient to create a case or controversy . . . For this reason I agree with the court that the challenge to the record-keeping and audit provisions of the FECA . . . is not yet ripe for review.

Buckley v. *Valeo,* 519 F.2d at 910 n.24 (Bazelon, C.J., concurring in part, and dissenting in part).

[14] Unlike the court of appeals, the district court attempted to overcome this problem by speculating that the FBI might be able to discover the records in the hands of the Committee "through the use of informants or other [unspecified] investigative techniques." App. 31a. However, there was nothing in the record indicating that the FBI had any informants in the Committee, or that the FBI's foreign

The court of appeals' decision that a minor party can obtain an exemption from the recordkeeping provision because of the possibility of a Commission audit in the future further undermines the Act's purposes. For as this Court found in *Buckley* v. *Valeo*, 424 U.S. at 67-68, reporting and recordkeeping are "an essential means of gathering the data necessary to detect violations of the contribution limitations. . . ." Thus, the court of appeals has not only exempted the Communist Party and its supporters from the reporting and recordkeeping provisions of the Act, but has also effectively immunized them from being required to comply with the Act's contribution limitations, which this Court has upheld as applied "to all candidates regardless of their present occupations, ideological views, or party limitations." *Buckley* v. *Valeo*, 424 U.S. at 31.[15]

Requiring the Committee to maintain verifiable records of its contributions will encourage the Committee

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intelligence investigation is in any way concerned with the Communist Party's lawful electoral activities. In any event, if it so desires the Committee can ensure that its records do not fall into the hands of any potential informants by limiting access to the records to the Committee's treasurer. The evidence in the record indicates that the ongoing FBI investigation does not involve break-ins to obtain documents; in fact, the *Senate Report* concluded that the FBI discontinued the use of surreptitious entry to obtain documents in 1966. *Senate Report*, Book III at 365.

[15] 2 U.S.C. § 441a(a)(1) prohibits individual contributions of more than $1,000 per election to a candidate's authorized committee; 2 U.S.C. § 441e(a) makes it unlawful for a candidate to accept contributions from foreign nationals; 2 U.S.C. § 441b makes it unlawful to accept contributions from any corporation or labor union; and 2 U.S.C. § 441g makes it unlawful to accept cash contributions of more than $100.

According to the affidavit submitted below by Committee treasurer Bordofsky, she reported to the Commission the names of those

and its contributors to conform their actions to the requirements of the law even if the Commission never actually audits those records, and the Committee can raise all of its constitutional objections to disclosure at the time, if ever, that the Commission seeks access to them. If the Commission sought to compel disclosure of the records, a federal court could then decide, in the context of a concrete factual situation, whether the governmental interest in obtaining confidential access to the records is sufficient to overcome the Committee's constitutional objections, and could fashion a protective order or other appropriate relief if necessary.[16] *See, e.g., FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965); *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41, 49 (1938); *SEC* v. *Arthur Young & Co.*, 584 F.2d 1018, 1032-1033 (D.C.Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); *NLRB* v. *Friedman*, 352 F.2d 545, 547-549 (3d Cir. 1965). But unless the Committee maintains the records, it will be immune from enforcement of the Act no matter how serious the violation or how compelling the circumstances. As this Court concluded in *California Bankers Ass'n.* v. *Shultz*, 416 U.S. at 55-56:

> [*NAACP* v. *Alabama*, 357 U.S. 449 (1958), and its progeny] do not elicit a *per se* rule that would forbid such disclosure in a situation where the governmen-

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persons who made contributions over $100 by check, and reported as anonymous those contributors of more than $100 who did not pay by check and did not otherwise decline anonymity. Any of these individuals who contributed more than $100 in cash would have violated 2 U.S.C. § 441g, but the Committee's failure to keep records would make it impossible to determine who had violated the Act.

[16] "Giving those records a confidential status effectuates the Congressional audit provisions, while avoiding undue encroachment on associational interests through disclosure. . . ." *Doe* v. *Martin*, 404 F. Supp. at 757.

> tal interest would override the associational interest in maintaining such confidentiality. Each of them was litigated after a subpoena or summons had already been served for the records of the organization . . . This Court, in the absence of a concrete fact situation in which competing associational and governmental interests can be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred by cases such as *NAACP* v. *Alabama*, *supra*.

These words are equally applicable to this case, and demonstrate the clear error in the decision of the court below.

CONCLUSION

A *writ* of *certiorari* should issue to review the decision of the United States Court of Appeals for the Second Circuit, and this case should be set for hearing with *Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776, *prob. juris. noted*, ____ U.S. ____, 102 S. Ct. 968 (Dec. 14, 1981).

Respectfully submitted,

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AUGUST 4, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 963—August Term, 1981

(Argued: April 26, 1982 Decided: May 6, 1982)

Docket No. 81-6229

FEDERAL ELECTION COMMISSION,
Plaintiff-Appellant,

—against—

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, *et al.*,
Defendants-Appellees.

Before:

KAUFMAN, VAN GRAAFEILAND, *Circuit Judges,*
and LOWE, *District Judge.**

Appeal from the judgment entered on an order of the United States District Court for the Southern District of New York, Gagliardi, *J.*, dismissing the complaint and granting summary judgment in favor of defendants.

Affirmed.

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* Of the United States District Court for the Southern District of New York, sitting by designation.

RICHARD B. BADER, Assistant General Counsel, Federal Election Commission, Washington, D.C. (Charles N. Steele, Jeffrey H. Bowman, Miriam Aguiar, Washington, D.C., *of Counsel*), *for Appellant.*

JOHN J. ABT, New York, New York (Jeffrey Schwartz, New York, New York, *of Counsel*), *for Appellees.*

VICTOR RABINOWITZ, Rabinowitz, Boudin, Standard, Krinsky & Lieberman, New York, New York, *for Amicus Curiae National Emergency Civil Liberties Committee.*

ARTHUR EISENBERG, New York, New York, JOEL GORA, Brooklyn, New York, *for Amicus Curiae New York Civil Liberties Union.*

KAUFMAN, *Circuit Judge:*

Anonymity has long been essential to uninhibited political activity in a democratic society. The secret ballot ensures that no one must answer for the vote he casts. Confidentiality prevents the apprehension of reprisal that threatens to suppress the robust interchange of ideas at the core of the First Amendment's guarantee of free speech and protection of privacy in association. A society confident in its stability does not fear the voice of opposition. Indeed, unafraid of dissent, we recognize our ability to exhibit special indulgence to nurture the free expression of minority views. Realizing that mere identification with certain disfavored ideologies can result in harassment which may silence those voices, the Constitution protects private support of political associations.

Today we are asked to determine whether, in this instance, the Constitution demands that a particular minority political group be exempted from certain disclosure and record-keeping requirements to safeguard

the privacy which is essential to the right of association of its members. This group, the Hall-Tyner Election Campaign Committee ("Committee"), supported the campaign of the candidates of the Communist Party, U.S.A., Gus Hall and Jarvis Tyner, in their drive to be elected President and Vice-President of the United States, respectively, in the 1976 national elections. The Federal Election Commission ("FEC") would have us find that the Committee and its Treasurer, Frances Bordofsky, must reveal the names and maintain records of contributors to its campaign coffers in the 1976 presidential election. Judge Gagliardi, granting summary judgment in favor of the Committee, held that the disclosure and recordkeeping requirements of the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.*, could not constitutionally be applied to the Committee and Bordofsky.[1] We agree, and for the reasons set forth below, we affirm.

The Federal Election Campaign Act ("FECA") imposes numerous restraints upon individuals and groups engaged in political activities relating to national elections.[2] At issue here is the applicability of the Act's recordkeeping and disclosure requirements to the Committee and Bordofsky. The literal terms of FECA re-

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[1] *See Federal Election Comm'n* v. *Hall-Tyner Election Campaign Comm.*, 524 F. Supp. 955 (S.D.N.Y. 1981).

[2] FECA was amended by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) effective after the alleged violations in this case. All citations are to the statute as codified prior the the 1979 amendments. Every candidate for federal office must designate a "principal campaign committee" which is charged with complying with the statutory requirements discussed below. 2 U.S.C. § 432(e). The Hall-Tyner Election Campaign Committee served as the principal campaign committee for the candidates of Gus Hall and Jarvis Tyner in 1976.

quired Bordofsky to maintain records specifying the name and address of each person who had contributed more than $50 to the Committee, and the name, address, occupation and principal place of business of each person contributing an amount in excess of $100.[3] On its face, the Act also mandated that the information concerning those who had contributed more than $100 be reported to the Federal Election Commission.[4]

On March 5, 1976, in response to a request from Bordofsky, the general counsel of the Committee, John J. Abt, rendered a written opinion that the recordkeeping and disclosure requirements of FECA were unconstitutional as applied to the Committee and its treasurer, Bordofsky. Pursuant to Abt's opinion, the Committee advised all potential contributors that they might, if they so desired, make their contributions anonymously, in which case the Committee would neither record nor report their names. In reports filed with the Federal Election Commission between April 10, 1976 and April 10, 1979, the Committee acknowledged financial contributions of $423,893.62 The itemized receipts included 76 contributors listed by name and 424 contributors listed as "anonymous."[5]

After an unsuccessful attempt to persuade the Committee to comply with the requirements of FECA, the Federal Election Commission instituted this civil enforcement action pursuant to 2 U.S.C. § 437g(a)(5)(B).

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[3] 2 U.S.C. § 432(c).

[4] 2 U.S.C. § 434(b)(2).

[5] These receipts were listed on Schedule A of FEC Form 3.

The Committee conceded that it had failed to comply with the Act. It argued, instead, that the recordkeeping and disclosure requirements were unconstitutional as applied to the Committee and Bordofsky on the ground that such application would abridge the First Amendment freedom of association rights of the Committee's supporters.

Upon cross-motions for summary judgment, Judge Gagliardi dismissed the FEC's complaint, holding that the recordkeeping and disclosure provisions of FECA are unconstitutional as applied to the Committee. He described the test for determining whether the application of the challenged portions of the FECA to the Committee could pass constitutional muster by applying the standards established in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Specifically, he recognized the ultimate question to be answered is whether the undisputed evidence in the record establishes, as a matter of law, a reasonable probability that compelled disclosure of the names of contributors " 'will subject them to threats, harassment, or reprisals from either Government officials or private parties?' " *Federal Election Comm'n* v. *Hall-Tyner Election Campaign*, 524 F. Supp. 955, 958 (S.D.N.Y. 1981). The evidence relied on by the district judge included the extensive body of state and federal legislation subjecting Communist Party members to civil disability and criminal liability, reports and affidavits documenting the history of governmental surveillance and harassment of Communist Party members, as well as affidavits indicating the desire of contributors to the Committee to remain anonymous. Based on this evidence, the judge concluded that there existed a reasonable probability of harassment of identified contributors to the Committee who were, in fact, sponsoring candidates of the Communist Party.

Clearly, this undisputed evidence demonstrated that mandatory disclosure and recordkeeping would dis-

courage numerous individuals from contributing to the Committee on the basis of the reasonable probability that they would later be subjected to governmental or private harassment and rebuke. Accordingly, we decline to apply the recordkeeping and disclosure provisions of FECA to the Committee for such requirements would violate the First Amendment of the Constitution.

II

The genesis of our holding lies in an analysis of the extent to which the Government may regulate election practices and procedure when such controls threaten to unreasonably impair the rights of privacy of association and belief guaranteed by the First Amendment. Our task is somewhat simplified because we do not write on a *tabula rasa*. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Supreme Court comprehensively assessed the constitutionality of FECA.[6] The Court concluded that although the disclosure provisions of FECA were not unconstitutional on their face, they might well be unconstitutional as applied to particular disfavored minority parties or groups. To apply the teachings of *Buckley* we must begin with a review of the constitutional and doctrinal trends which have shaped the contours of First Amendment protections for those with unpopular views who venture into the arena of political debate.

Free speech would be a hollow right indeed if it meant only that the majority remained free to express thoughts

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[6] The Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), considered the provisions of FECA as they existed prior to the 1976 amendments. The recordkeeping requirements at that time related to all contributions in excess of $10. In 1976, the threshold amount was raised to $50. Pub. L. No. 94-283 § 103(b), 90 Stat. 480 (1976).

consistent with conventional wisdom. The principle of free expression requires that all groups remain unfettered when expounding their ideologies, regardless of how universally disfavored or repugnant those opinions may be. In his first Inaugural Address nearly two centuries ago, Thomas Jefferson eloquently phrased this fundamental precept:

> If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.[7]

The diversity of thought which our Nation cherishes is at the core of our intellectual richness. The First Amendment represents a faith in the ability of the public to discard dangerous or erroneous policies, and a belief that the Republic is strengthened by an uninhibited competition of ideas. As Justice Holmes taught, the theory of our Constitution is that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).[8]

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[7] The belief that the opposition need not be silenced because truth will ultimately triumph has been shared by well recognized and thoughtful writers. *See e.g.*, J. Locke, A Letter Concerning Toleration 151 (J.W. Gough ed. 1948) ("For the truth will certainly do well enough if she were left for herself."); J. Milton, Areopagitica 78, 126 (J. C. Suffolk ed. 1968) ("[W]ho ever knew truth put to the worse, in a free and open encounter?").

[8] *See Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968) ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms").

Tolerance of the unpopular and disagreeable is the hallmark of a truly free society.[9]

There is a paramount public interest in maintaining a vigorous and aggressive political system which includes even participants whose ideologies are abhorrent to that system. This principle repels totalitarianism and the rise of dictators by permitting even those whose views are anathema to ours to partake in the dynamics of an open and vigorous election without fear of reprisal.

Acknowledging the importance of fostering the existence of minority political parties, we must also recognize that such groups rarely have a firm financial foundation. If apprehension is bred in the minds of contributors to fringe organizations by fear that their support of an unpopular ideology will be revealed, they may cease to provide financial assistance. The resulting decrease in contributions may threaten the minority party's very existence. Society suffers from such a consequence because the free flow of ideas, the lifeblood of the body politic, is necessarily reduced. Accordingly, a nation dedicated to free thought and free expression cannot ignore the grave results of facially innocuous election requirements.

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[9] Our commitment to these principles has been demonstrated on innumerable occasions. The Supreme Court has insisted that the procedural safeguards required of a State seeking to enjoin a demonstration be rigorously followed, even when the group targeted is Nazis, intent on preaching hatred and antisemitism, *National Socialist Party* v. *Village of Skokie*, 432 U.S. 43 (1977) (per curiam). Similarly, the Court has held that a leader of the Ku Klux Klan may not be convicted for advocating the use of force unless the advocacy is directed to inciting "imminent lawless action." *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

The power of a government to repress dissent is substantial and can be exercised in a myriad of subtle ways. Privacy is an essential element of the right of association and the ability to express dissent effectively. As a result, removing the cloak of anonymity from a political committee by requiring it to disclose the names of those who purchase its publications threatens important First Amendment values. Such forced revelations would likely lead to "vexatious inquiries" which consequently could instill in the public an unremitting fear of becoming linked with the unpopular or the unorthodox. *United States* v. *Rumely*, 345 U.S. 41, 56-58 (1953) (Douglas, J., concurring).

A unanimous Supreme Court in *NAACP* v. *Alabama*, 357 U.S. 449 (1958), fashioned its decision with this doctrinal tool when it held that the NAACP could not be compelled to deliver to the Alabama Attorney General the names and addresses of its members and agents in the State of Alabama. Recognizing "the vital relationship between freedom to associate and privacy in one's associations," *id.* at 462, the Court declared that the constitutional prohibition against mandatory identification of supporters is particularly strong when the group is associated with unpopular positions: "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.*

These principles have consistently been reaffirmed as courts protect freedom of association not only against direct attack, but against inroads by the insidious interference that often follows public identification with controversial organizations. In sustaining a constitutional challenge to a coerced disclosure of NAACP membership lists, for instance, the Supreme Court

reasoned that the evidence indicated that the government's action represented a substantial encroachment upon the right of privacy of association. *Bates* v. *Little Rock*, 361 U.S. 516 (1960). The adverse impact that publication of the lists would have on membership caused particular concern, for the NAACP had suffered significant harassment in the past. *Id.* at 524.

Emanating from these cases is a fundamental tenet of First Amendment jurisprudence. Because compelled disclosure can seriously impair the right to privacy of association and belief, it is permissible only upon a showing of compelling state interest. *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963). With these principles firmly in mind, we turn to the Supreme Court's consideration of the broad challenge to FECA in *Buckley* v. *Valeo, supra*.

III

In *Buckley* v. *Valeo, supra*, the Supreme Court was presented with a sweeping facial challenge to the heart of the central provisions of the 1974 Amendments to the Federal Election Campaign Act. Included was an overbreadth challenge to the constitutionality of the Act's disclosure requirements. The Court reaffirmed the time-honored doctrine that statutorily mandated disclosure must be justified by a compelling governmental interest and that there must be a "substantial relation" between the governmental interest[10] and the information required to be revealed. 424 U.S. at 64.

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[10] The Court specified three governmental interests thought to be served by the disclosure requirements. Disclosure of the sources of political campaign funds assists voters in ascertaining the political proclivities of candidates. In addition, it deters corruption by expos-

Although the Court held that there was a sufficient correlation between governmental interests and the required disclosures to survive a facial attack, it also recognized that the result might well be different when the disclosure was sought from a minority party: "[T]he governmental interest in disclosure is diminished when the contribution in question is made to a minor party with little chance of winning an election." *Id.* at 70. Tacitly acknowledging the necessity of fostering the stability and existence of minority parties, the Court articulated a flexible rule: When a minority party demonstrates a reasonable probability of harassment caused by disclosure, FECA's requirements cannot constitutionally be applied to the party.[11]

In assessing the evidence of harassment in this case, we note that *Buckley* did not impose unduly strict or burdensome requirements on the minority group seeking constitutional exemption. A minority party striving to avoid

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ing large contributions that might otherwise influence the recipient to deliver secret post-election favors should he win the election. Finally, disclosure facilitates the detection of violations of the FECA contribution limitations. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 66-68.

[11] Responding to the concern that harrassment is often illusive and difficult to prove, the Supreme Court stated that minority parties "must be allowed sufficient flexibility in the proof of injury." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 74. This flexibility meant that:

> The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. *Id.*

FECA's disclosure provisions does not carry a burden of demonstrating that harassment will certainly follow compelled disclosure of contributors' names. Indeed, when First Amendment rights are at stake and the spectre of significant chill exists, courts have never required such a heavy burden to be carried because " 'First Amendment freedoms need breathing space to survive' ". *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967), *quoting NAACP* v. *Button*, 371 U.S. 415, 433 (1963). Breathing space is especially important in a historical context of harassment based on political belief. Our examination of the treatment historically accorded persons identified with the Communist Party and a survey of statutes still extant reveal that the disclosure sought by the FEC would have the effect of restraining the First Amendment rights of supporters of the Committee to an extent unjustified by the minimal governmental interest in obtaining the information.[12]

Numerous statutes purport to subject members of the Communist Party to both civil disabilities and criminal liability. For example, the Communist Control Act, 50 U.S.C. § 841 *et seq.*, declares that the Communist Party of the United States "is in fact an instrumentality of a conspiracy to overthrow the Government of the United States." The preamble to this Act concludes with the statement that "the Communist Party should be outlawed." The statute further provides that "whatever rights, privileges, and immunities which have heretofore been granted to said [Communist] party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated." *Id.* at

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[12] *See Buckley* v. *Valeo*, *supra*, 424 U.S. at 70-71.

§ 842. In addition, the rights and benefits of our national equal employment opportunity laws do not cover any "individual who is a member of the Communist Party of the United States." 42 U.S.C. § 2000e-2(f). Moreover, by statute, a naturalized citizen can have his citizenship revoked, 8 U.S.C. § 1451(c), and can be deported, 8 U.S.C. § 1251(a)(6)(C), for membership in the Communist Party.

Several states also have enacted laws which place supporters of the Committee in danger of legal sanctions or harassment if their ties with the Communist Party should be made public. It is still illegal in many states simply to be a member of the Communist Party.[13] Contributions to the Communist Party are also proscribed by many state statutes.[14]

These laws, drafted by Congress and the legislatures of the various states, are an ever-present threat of reprisal to those who contribute to the Committee. It is of little moment that prosecutions under these laws are rare and that these statutes may currently lie dormant.[15] Surely, it

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[13] *E.g.*, Fla. Stat. § 876.02(5) (1976); Mass. Ann. Laws ch. 264, §§ 16A, 17, 19 (Michie/Law. Co-op. 1980); Okl. Stat. tit. 21, § 1266.4(4) (1961); Tex. Rev. Civ. Stat. Ann. Art. 6889-3A, § 5(4) (Vernon 1960).

[14] *E.g.*, Mass. Ann. Laws ch. 264, § 23 (Michie/Law. Co-op 1980); Okl. Stat. tit. 21, § 1266.4(4) (1961); Tex. Rev. Civ. Stat. Ann. art. 6889-3A, § 5(4) (Vernon 1960).

[15] The FEC points out that some of the statutes directed at members of the Communist Party have been declared unconstitutional by the courts, *See, e.g., Boord* v. *Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1042 (1970) holding unconstitutional the disclosure provisions of the Subversive Activities Control Act). This misses the point for three reasons. First, these statutes are significant as a reflection of popular will and

is not inconceivable that a statute long ignored may suddenly be resurrected and employed in a criminal prosecution. *Compare Poe* v. *Ullman*, 367 U.S. 497 (1961) *with Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Moreover, although a penal statute may not be enforced, First Amendment freedoms may still suffer from its lingering presence. *See Epperson* v. *Arkansas*, 393 U.S. 97, 101-02 (1968).

The Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 755, 94th Cong., 2d Sess. (1976) ("Senate Report"), details the extensive governmental surveillance and harassment long directed at the Communist Party and its members. The Senate Report reveals a Federal Bureau of Investigation counterintelligence program known as "CPUSA COINTELPRO" which involved the mailing of anonymous letters to employers and spouses of suspected Party members as well as the instigation of IRS investigations of their federal tax returns. Although the CPUSA COINTELPRO program was terminated in 1971,[16] the record in this case includes an affidavit by the Assistant Director of the

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therefore evidence popular animus against the Communist Party. Second, many of these statutes have not been declared unconstitutional and may be used in the future by a zealous prosecutor. The right of free speech can be trampled or chilled even if convictions are never obtained. Finally, the statutes may be reinterpreted to avoid the direct constitutional infirmity. *See, e.g., People* v. *Eapton*, 19 N.Y.2d 496, 281 N.Y.S.2d 9, 227 N.E.2nd 829 (1967), *cert. denied and appeal dismissed*, 390 U.S. 29 (1968) (New York's criminal anarchy statute reinterpreted to avoid its unconstitutionality in a case where the president of a communist club was prosecuted.).

[16] Public dissemination of the Senate Report, with its relevation concerning CPUSA COINTELPRO, did not occur until 1976, the very year of concern in this case. The potential chill of this program may very well have been at its zenith just as the Committee was soliciting contributions from people demanding anonymity.

Intelligence Division of the FBI stating that the Communist Party of the United States remains under active investigation by the FBI. This acknowledgement of continuing FBI surveillance merits substantial weight in any evaluation of the chilling effect the FECA disclosure requirements may impose upon cherished First Amendment freedoms.

In light of this telling evidentiary background, it is not surprising that the Committee received contributions from individuals only after an assurance of anonymity.[17] The stigma arising from public disclosure, which causes potential supporters of an organization to refrain from engaging in protected activity, emphasizes the danger to First Amendment rights posed by disclosure requirements. *See Shelton* v. *Tucker*, 364 U.S. 479, 486-87 (1960). When fear of injury that is neither imaginery nor speculative discourages the exercise of valued and revered First Amendment rights, courts must intercede. *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 301-03 (1979).

As we have noted, to hold that the FECA disclosure provisions may not be appropriately applied to the Committee, it is not necessary to conclude that people identified as supporters of the Communist Party will beyond question be harassed. The test given us by the Supreme Court is that we need only find a "pattern of threats or specific manifestations of public hostility . . . ." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 74. We believe that the

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[17] The Committee submitted affidavits from twelve individuals who explained that they gave their contributions only after being assured that their names would not be revealed. Bordofsky stated in a separate affidavit that the same was true of most people solicited by the Communist Party.

evidence adduced amply meets this standard and, in addition, sufficiently demonstrates a substantial infringement of the right of privacy of association and belief not justified by the Government's relatively insignificant interest in disclosure. *See id.* at 70. It is clear in the circumstances presented here that "the public opprobrium and obloquy which may attach to an individual [identified] as a member of a Communist-action organization is no less considerable than that . . . in *N.A.A.C.P.* and *Bates.*" *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 102 (1961).

Only a few words need be added on the recordkeeping requirements. The Federal Election Commission suggests that this provision can be applied to the Committee even if the disclosure demand cannot. We disagree. It is clear that the ultimate thrust of the recordkeeping requirement is the likelihood of eventual review and oversight by the Government. *See* 2 U.S.C. § 438(a)(8) (FEC authorized to conduct audit and field investigations). Indeed, to the extent that these records are never disclosed or obtained by anyone outside the Committee, there is little governmental interest served. The impact on the right of privacy of association by the recordkeeping requirement is as severe as that caused by the disclosure provisions. We therefore hold that these statutory terms, like the disclosure requirements, may not be applied to the Committee.

IV

On another occasion, the Federal Election Commission has been admonished to exercise its authority in a manner harmonious with a system of free expression because an abuse of its power is most repugnant to those who cherish the First Amendment and the unfettered political process it guarantees. *F.E.C.* v. *Central Long Island Tax Re-*

form Immediately Committee, 616 F.2d 45, 55 (2d Cir. 1980) *(en banc)*. Unfortunately, the Commission has failed to heed this warning.

For the FEC to pursue so vigorously its demand for the names and addresses of the contributors to the Committee in the face of the clear chilling effect this activity will inevitably have is to exhibit an appalling disregard for the needs of the free and open political process safeguarded by the First Amendment. This agency charged with administering a comprehensive statute governing fundamental First Amendment freedoms[18] should tread far more lightly than is apparent here. When dealing with values as fragile and precious as those contained in the First Amendment, special care is required.

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[18] *See Buckley* v. *Valeo*, *supra*, 424 U.S. at 14.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of May one thousand nine hundred and eighty-two

Present: HON. IRVING R. KAUFMAN,
HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges
HON. MARY JOHNSON LOWE,
District Judge

#81-6229

FEDERAL ELECTION COMMISSION,
Plaintiff-Appellant,

v.

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. Daniel Fusaro, Clerk

by Arthur Heller, Deputy Clerk
ARTHUR HELLER, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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78 Civ. 3508

OPINION

FEDERAL ELECTION COMMISSION,
Plaintiff,

—against—

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, *et al.*,
Defendants,

APPEARANCES:

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GAGLIARDI, D.J.

The Federal Election Commission (the "FEC") commenced this action for a civil penalty and declaratory and injunctive relief against the Hall-Tyner Election Cam-

paign Committee (the "Committee") and the treasurer of the Committee, Frances Bordofsky. The action is based upon alleged violations of the Federal Election Campaign Act (the "FECA"), 2 U.S.C. § 431 *et seq.*,[1] during the 1976 presidential election campaign. Defendants admit to engaging in the conduct constituting the alleged violations, but assert that the relevant provisions of the FECA as applied to defendants deprive the supporters of the Committee of their First Amendment rights to privacy of association and belief. Both plaintiff and defendants have moved for summary judgment pursuant to Rule 56, Fed. R. Civ. P. For the reasons set forth below, the court has concluded that defendants' motion should be granted and the complaint dismissed.[2]

Background

Gus Hall and Jarvis Tyner were the candidates of the Communist Party, U.S.A. (the "Party") for the offices of President and Vice-President of the United States, respectively, in the 1976 election. The principal campaign committee[3] supporting their candidacy was the defendant

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[1] The FECA was amended by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980), effective subsequent to the date of the alleged violations in the instant case. Accordingly, all citations are to the statute as codified prior to the 1979 amendments.

[2] Also pending before the court is a motion to quash a subpoena *duces tecum* served by the defendants on the Federal Bureau of Investigation. That motion is rendered moot by the resolution of these motions.

[3] Under 2 U.S.C. § 432(e), every candidate for federal office is required to designate a "principal campaign committee" which must comply with the FECA requirements discussed below.

Committee. Defendant Bordofsky was treasurer of the Committee.

The FECA requirements at issue in this action imposed recordkeeping and disclosure responsibilities on the Committee and Bordofsky. Under the recordkeeping provisions, Bordofsky was required to maintain records identifying the name and address of each person contributing in excess of $50 to the Committee, and the name, address, occupation and principal place of business of each person contributing more than $100. 2 U.S.C. § 432(c). The FECA disclosure provisions required that the Committee include in filings with the FEC the recorded information pertaining to contributors of more than $100. 2 U.S.C. § 434(b)(2).

On March 5, 1976 the general counsel to the Committee rendered a written opinion to the defendants that these recordkeeping and disclosure provisions were unconstitutional as applied to the Committee and its treasurer, Bordofsky. Pursuant to this opinion, the Committee listed 424 contributors of more than $100 as "anonymous" in its reports filed with the FEC.[4] In addition, defendant Bordofsky failed to comply with the FECA recordkeeping requirements with respect to any contributors who elected to remain anonymous.

Thereafter, following an unsuccessful attempt by the FEC to obtain compliance with the statute through informal methods of conference, conciliation, and persuasion, *see* 2 U.S.C. § 437g(a)(5)(A), the FEC instituted the instant civil enforcement action pursuant to 2 U.S.C. § 437g(a)(5)(B). The parties are agreed that the sole issue

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[4] An additional 76 contributors of more than $100 were identified in accordance with the FECA requirements. *See* Brown Affidavit ¶ 6.

before this court is whether the above-cited FECA recordkeeping and disclosure requirements, as applied to the defendants, unconstitutionally abridge the associational rights guaranteed to the supporters of the Committee by the First Amendment.

Discussion

I. *The Disclosure Requirements*

It is well established that the compelled disclosure of members in or contributors to an organization "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976); *see, e.g.*, *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1970); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Accordingly, governmental regulations requiring such disclosure must survive exacting judicial scrutiny. *Id.* Under this standard the government must show that the regulations further compelling governmental interests sufficient to justify the burden that compelled disclosure places on constitutionally protected rights. *NAACP* v. *Alabama*, *supra*, 357 U.S. at 463; *Pollard* v. *Roberts*, 283 F. Supp. 248, 256-57 (E.D. Ark.) (three-judge court), *aff'd mem.*, 393 U.S. 14 (1968).

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Supreme Court applied these principles in analyzing a constitutional overbreadth attack on the FECA disclosure provisions at issue in the instant case.[5] The attack fo-

[5] *Buckley* addressed the provisions of the FECA prior to the 1976 amendments. At that time, the recordkeeping requirements pertained to all contributions in excess of $10. The 1976 amendments, applicable in the instant case, raised the threshold amount to $50. Pub. L. No. 94-283, § 103(b), 90 Stat. 480 (1976).

cused, in part, on the application of the disclosure requirements to minor political parties. The Court identified three substantial governmental interests generally served by the disclosure requirements. First, disclosure permits the electorate to more accurately determine the position of the candidates in the political spectrum, and alerts voters to the obligations of the candidates to special interests. Second, the requirements deter corruption by publicizing large contributions and expenditures. Finally, disclosure along with recordkeeping provides an essential means for detecting violations of the FECA contribution limitations. 424 U.S. at 66-68.

The Court concluded that these important governmental interests are less substantial when the disclosure requirements are applied to minor parties:

> [T]he governmental interest in disclosure is diminished when the contribution in question is made to a minor party with little chance of winning an election. As minor parties usually represent definite and publicized viewpoints, there may be less need to inform the voters of the interests that specific candidates represent. . . .
>
> The Government's interest in deterring the "buying" of elections and the undue influence of large contributors on officeholders also may be reduced where contributions to a minor party . . . are concerned, for it is less likely that the candidate will be victorious.

Id. at 70. The Court also recognized that the disclosure requirements create a more onerous threat to First Amendment rights when applied to minor parties:

> These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also

> suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.

Id. at 71 (footnotes omitted).

Although the Court held that a blanket exemption for minor parties is not constitutionally required, it concluded that the disclosure requirements of the FECA cannot be constitutionally applied where the record demonstrates that disclosure will expose contributors and members of the organization to a substantial threat of harassment, which would impermissibly impinge upon protected associational activity. *Id.* at 72-74. The standard for determining whether the demonstrated impact on First Amendment rights is sufficient to require an exemption from the disclosure requirements was set forth as follows:

> The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.

Id. at 74.

Accordingly, this court must determine whether the undisputed evidence in the record establishes, as a matter of law, "a reasonable probability" that compelled disclosure of the names of contributors to the defendant Committee "will subject them to threats, harassment, or reprisals from either Government officials or private parties." Defendants rely on five essential items of proof in order to satisfy the *Buckley* standard. Each of these is analyzed below.

1. Defendants cite an extensive body of state and federal legislation which purports to subject members of the Communist Party to both civil disabilities and criminal liability. This legislation clearly manifests the pervasive public hostility that has been, and continues to be, directed towards the Communist Party. *See, e.g.*, Communist Control Act, 50 U.S.C. § 841 *et seq.*[6]

2. Defendants submitted to this court a summary of the Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) (the "Senate Report").[7] This report sets forth a detailed history of extensive programs of governmental surveillance and harassment directed at the Party and its members by government agencies. These programs include, for example, the "counterintelligence program" im-

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[6] 50 U.S.C. § 841 sets forth the following declaration of Congress:

> [T]he Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. . . . [I]ts role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

[7] The court takes judicial notice of the Senate Report. Of course, any facts subject to judicial notice may be properly considered in a motion for summary judgment. *See* 6 *Moore's Federal Practice* ¶ 56.11[9]. Although the FEC challenges the probative value of the report as evidence that FECA disclosure will lead to the harassment of contributors, it has not challenged, through an appropriate affidavit or otherwise, the validity of the Senate Report's factual assertions.

plemented by the Federal Bureau of Investigation ("FBI"), known as "CPUSA COINTELPRO," which involved mailing anonymous letters to employers and spouses of suspected Party members, and provoking IRS investigations of their federal tax returns.[8] Other operations included the extensive use of informants, surreptitious mail opening, and electronic surveillance programs.

3. The record includes an affidavit filed by the Assistant Director of the Intelligence Division of the FBI indicating that the Communist Party, USA is under active investigation by the FBI.[9] The affidavit asserts that the investigation is being conducted in full compliance with "the procedures, requirements and restrictions imposed by the Attorney General Guidelines [for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations], Executive Order 12036, applicable statutes, and the Constitution of the United States." The FEC asserts that the existance of a pending lawful investigation may not amount to factual evidence in support of a First Amendment claim under the *Buckley* standard. This contention must be rejected. The publicly admitted existence of ongoing FBI surveillance operations, even though lawful, is highly probative of the extent to which protected associational activities are likely to be chilled by the FECA disclosure requirements.

4. Defendants submitted to the court, *in camera*, the affidavits of twelve persons asserting that they made

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[8] This program was in effect from 1956 to 1971.

[9] This affidavit was filed in response to defendants' subpoena of documents directed to the FBI. *See* note 2, *supra*. The court has also examined, *in camera*, a memorandum dated October 5, 1976, signed by former Attorney General Edward H. Levi, authorizing continued surveillance of the Party.

contributions to the Committee in 1976 only after receiving an assurance of anonymity.[10] The court agreed to maintain the affidavits under seal and not to disclose the identity of the affiants. Defendants provided the FEC with copies of the affidavits with the names and other identifying information expunged. The affidavits set forth the reasons of the affiants for conditioning their contributions on an assurance of anonymity. Each asserts that the insistence on anonymity stems from the history of governmental harassment of the Party and its suspected members and supporters, and the ongoing investigative operations of the FBI. The affiants express fear of a variety of specific consequences that could result from disclosure, including the possible loss of employment, business and citizenship.

The FEC maintains that these affidavits are not relevant to the showing required by *Buckley*, since they merely reflect the subjective opinions of the affiants about the consequences of FECA recordkeeping and disclosure. This contention is without merit. Disclosure requirements may infringe upon First Amendment rights precisely because the possible consequences of disclosure may instill sufficient fear in potential supporters of the organization to deter them from engaging in protected associational activity. *See Buckley*, 424 U.S. at 71.[11]

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[10] The affidavits were submitted at the suggestion of the court after the FBI filed objections to defendants' subpoena which requested, *inter alia*, all records of FBI investigations of the Party.

[11] Plaintiff also makes a conclusory assertion that the affidavits fail to comply with Rule 56(e). There is no proper basis for this contention. As required by Rule 56(e), each of the affidavits is made on personal knowledge and sets forth "proof which if presented at a formal trial would be competent to support the issues to which it is

5. Defendant Bordofsky, treasurer of the Committee, has filed an affidavit, essentially asserting that most persons solicited by the Party for contributions refused to contribute unless they were assured of anonymity.

The court concludes from the evidence outlined above that defendants have established as a matter of law "a reasonable probability that the compelled disclosure of . . . . contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. The record plainly reflects an extensive history of governmental harassment and public hostility directed at the Party and its members and supporters. This history, in conjunction with the ongoing investigation by the FBI, and evidence of the continuing climate of fear set forth in the affidavits of anonymous contributors to the Committee, amply establishes that severe abridgment of associational rights is likely to follow from the compulsory disclosure of supporters of Communist Party candidates.[12]

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directed." *Banco de Espana* v. *Federal Reserve Bank of New York*, 114 F.2d 438, 445 (2d Cir. 1940). In fact "any or all statements in the affidavit that would be admissible in evidence . . . if the affiant was on the stand and testifying, is admissible on the issue of whether or not to grant summary judgment." 6 *Moore's Federal Practice* ¶ 56.22[1].

[12] The FEC asserts that the evidence properly before the court is insufficient to satisfy the *Buckley* standard since the record is devoid of any evidence of harassment with respect to either individuals who signed state ballot access petitions for Gus Hall and Jarvis Tyner or contributors to their campaign effort whose names were recorded and reported in compliance with the FECA requirements. This contention is without merit. The court may not impose "[a] strict requirement that chill and harassment be directly attributable to the

The substantial infringement on First Amendment rights demonstrated in the record cannot be justified by the governmental interests furthered by applying the FECA disclosure requirements to the defendants. Hall and Tyner received only 58,689 votes in the 1976 election, and the Committee received only $423,894 in campaign contributions.[13] The viewpoint of the Party is clearly defined, and there is nothing in the record indicating that Party candidates could either win elective office or substantially affect the outcome of an election in the foreseeable future.

Accordingly, the FECA provisions for compulsory disclosure of contributors cannot be constitutionally applied to these defendants.

II. *The Recordkeeping Requirements*

Defendants assert that in addition to the disclosure requirements, the FECA recordkeeping requirements, as applied to the Committee and its treasurer, impermissibly infringe upon associational activity protected by the First Amendment. Although records maintained pursuant to 2 U.S.C. § 432(c) are subject to periodic audits and field investigations by the FEC under 2 U.S.C. § 438(a)(8), the FECA does not authorize the disclosure of the records to the public. *Buckley*, 424 U.S. at 84. Defendants argue that notwithstanding the

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specific disclosure from which the exemption is sought." Such "unduly strict requirements of proof" were expressly disapproved in *Buckley*. 424 U.S. at 74; *see Wisconsin Socialist Workers 1976 Campaign Committee* v. *McCann*, 433 F. Supp. 540, 548 (E.D. Wisc. 1977).

[13] Contributions to other campaign committees supporting Hall and Tyner only amounted to an additional $131,989. *See* Brown Affidavit ¶¶ 6-9.

purportedly confidential nature of these records, the evidence before this court establishes that recordkeeping would chill the exercise of protected associational activity to the same extent as would public disclosure. No such claim was addressed by the Supreme Court in *Buckley*.

The court concludes that under the unique facts of the instant case, the FECA recordkeeping requirements could indeed significantly infringe upon the exercise of First Amendment rights. The FBI is actively engaged in an ongoing investigation of the Communist Party, U.S.A. It is surely reasonable, therefore, for potential contributors to the Party to expect that the FBI would discover their identity through the use of informants or other investigative techniques, if their names were recorded in records maintained by the Committee. The ongoing investigation together with the demonstrated history of pervasive governmental harassment aimed at Party members establishes a "reasonable probability" that FECA recordkeeping would subject contributors "to threats, harassment, or reprisals from either Government officials or private parties." The chilling effect on associational interests is further evidenced by the twelve affidavits submitted to the court by anonymous contributors, which indicate each affiant's fear that the information contained in Committee records would fall into the hands of the FBI.

The FEC maintains that the substantial governmental interests underlying the FECA recordkeeping requirements justify whatever burden is placed on the exercise of First Amendment rights. Indeed, this court is mindful of the fact that "there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Buckley, supra*, 424 U.S. at 66, *quoting Communist Party* v. *Subversive Acti-*

vities Control Bd., 367 U.S. 1, 97 (1961). The FEC's principal objection to exempting defendants from recordkeeping is that it would prevent effective enforcement of the FECA contribution limitations.[14] Accordingly, in order to evaluate the governmental interests served by applying the recordkeeping requirements to the defendants, it is necessary to analyze the interests furthered by effectively enforcing the FECA contribution limitations against contributors to the Committee.

In *Buckley*, the Court held that the FECA contribution limitations can be constitutionally justified by the primary governmental interest served by the FECA as a whole. This interest is:

> to limit the actuality and appearance of corruption resulting from large individual financial contributions. . . . To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Id. at 26-27. It is readily apparent that this important governmental interest is not significantly furthered by effective enforcement of the contribution limits against contributors to the Committee. As observed above, there is nothing in the record which suggests that Party candidates could in the foreseeable future either win elective

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[14] The relevant contribution limitations are currently codified at 2 U.S.C. § 441a.

office or have a significant impact on the outcome of an election. Therefore, no one is likely to contribute to a Communist Party campaign committee with a reasonable expectation of exacting a *quid pro quo* from a current or potential elected official. Accordingly, the interest furthered by providing the FEC with data to enforce the contribution limitations against the contributors to the Committee is not sufficiently compelling to justify the injury resulting to important First Amendment rights.[15]

Therefore, the FECA recordkeeping requirements are unconstitutional as applied to the defendants.

Conclusion

The court concludes that the undisputed facts in the record establish as a matter of law that the relevant provisions of 2 U.S.C. §§ 432(c) and 434(b)(2), as applied to defendants, violate the First Amendment to the Constitution. Plaintiff's motion for summary judgment is denied. Defendants' motion for summary judgment is granted, and the complaint is dismissed.

So Ordered.

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U.S.D.J.

Dated: New York, New York
September 22, 1981.

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[15] The FEC also vaguely asserts that the absence of proper records will impede enforcement of other FECA prohibitions. There is, however, no basis in the record for concluding that substantial governmental interests will be furthered should more stringent enforcement of other FECA provisions against contributors to the Committee be made possible by recordkeeping pursuant to 2 U.S.C. § 432(c).

APPENDIX D

FEDERAL ELECTION CAMPAIGN ACT of 1976

2 U.S.C. § 432. Organization of political committees[1]

(a) *Chairman; treasurer; vacancies; official authorizations.* Every political committee shall have a chairman and a treasurer. No contribution and no expenditure shall be accepted or made by or on behalf of a political committee at a time when there is a vacancy in the office of the chairman or treasurer thereof. No expenditure shall be made for or on behalf of a political committee without the authorization of its chairman or treasurer, or their designated agents.

(b) *Account of contributions; segregated funds.* Every person who receives a contribution in excess of $50 for a political committee shall, on demand of the treasurer, and in any event within 5 days after receipt of such contribution, render to the treasurer a detailed account thereof, including the amount of the contribution and the identification of the person making such contribution, and the date on which received. All funds of a political committee shall be segregated from, and may not be commingled with, any personal funds of officers, members, or associates of such committee.

(c) *Recordkeeping.* It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of—

(1) all contributions made to or for such committee;

(2) the identification of every person making a contribution in excess of $50, and the date and amount thereof

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[1] The former Sec. 432(e), "Unauthorized activities; notice," was stricken from the United Staes Code by P.L. 94-283. Its provisions are now governed by Sec. 441d.

(3) all expenditures made by or on behalf of such committee; and

(4) the identification of every person to whom any expenditure is made, the date and amount thereof and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made.

(d) *Receipts; preservation.* It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure made by or on behalf of a political committee in excess of $100 in amount, and for any such expenditure in a lesser amount, if the aggregate amount of such expenditures to the same person during a calendar year exceeds $100. The treasurer shall preserve all receipted bills and accounts required to be kept by this section for periods of time to be determined by the Commission.

(e) *Principal campaign committee; reports, filing.*

(1) Each individual who is a candidate for Federal office (other than the office of Vice President of the United States) shall designate a political committee to serve as his principal campaign committee. No political committee may be designated as the principal campaign committee of more than one candidate, except that the candidate for the office of President of the United States nominated by a political party may designate the national committee of such political party as his principal campaign committee. Except as provided in the preceding sentence, no political committee which supports more than one candidate may be designated as a principal campaign committee. Any occasional, isolated, or incidental support of a candidate shall not be construed as support of such candidate for purposes of the preceding sentence.

(2) Notwithstanding any other provision of this title, each report or statement of contributions received or

expenditures made by a political committee (other than a principal campaign committee) which is required to be filed with the Commission under this title shall be filed instead with the principal campaign committee for the candidate on whose behalf such contributions are accepted or such expenditures are made.

(3) It shall be the duty of each principal campaign committee to receive all reports and statements required to be filed with it under paragraph (2) of this subsection and to compile and file such reports and statements, together with its own reports and statements, with the Commission in accordance with the provisions of this title.

2 U.S.C. § 434. Reports

(a) *Receipts and expenditures; completion date, exception.*

(1) Except as provided by paragraph (2), each treasurer of a political committee supporting a candidate or candidates for election to Federal office, and each candidate for election to such office, shall file with the Commission reports of receipts and expenditures on forms to be prescribed or approved by it.

The reports referred to in the preceding sentence shall be filed as follows:

(A) (i) In any calendar year in which an individual is a candidate for Federal office and an election for such Federal office is held in such year, such reports shall be filed not later than the 10th day before the date on which such election is held and shall be complete as of the 15th day before the date of such election; except that any such report filed by registered or certified mail must be postmarked not later than the close of the 12th day before the date of such election;

(ii) such reports shall be filed not later than the 30th day after the date of such election and shall be complete as of the 20th day after the date of such election.

(B) In any other calendar year in which an individual is a candidate for Federal office, such reports shall be filed after December 31 of such calendar year, but not later than January 31 of the following calendar year and shall be complete as of the close of the calendar year with respect to which the report is filed.

(C) Such reports shall be filed not later than the 10th day following the close of any calendar quarter in which the candidate or political committee concerned received contributions in excess of $1,000, or made expenditures in excess of $1,000, and shall be complete as of the close of such calendar quarter: except that any such report required to be filed after December 31 of any calendar year with respect to which a report is required to be filed under subparagraph (B) shall be filed as provided in such subparagraph. In any year in which a candidate is not on the ballot for election to Federal office, such candidate and his authorized committees shall only be required to file such reports not later than the 10th day following the close of any calendar quarter in which the candidate and his authorized committees received contributions or made expenditures, or both, the total amount of which, taken together, exceeds $5,000, and such reports shall be complete as of the close of such calendar quarter; except that any such report required to be filed after December 31 of any calendar year with respect to which a report is required to be filed under subparagraph (B) shall be filed as provided in such subparagraph.

(D) When the last day for filing any quarterly report required by subparagraph (C) occurs within 10 days of an election, the filing of such quarterly report shall be waived and superseded by the report required by subparagraph (A)(i).

Any contribution of $1,000 or more received after the 15th day, but more than 48 hours, before any election shall be reported within 48 hours after its receipt.

(2) Each treasurer of a political committee authorized by a candidate to raise contributions or make expenditures on his behalf, other than the candidate's principal campaign committee, shall file the reports required under this section with the candidate's principal campaign committee.

(3) Upon a request made by a Presidential candidate or a political committee which operates in more than one State, or upon its own motion, the Commission may waive the reporting dates set forth in paragraph (1)(other than the reporting date set forth in paragraph (1)(B)), and require instead that such candidate or political committee file reports not less frequently than monthly. The Commission may not require a Presidential candidate or a political committee operating in more than one State to file more than 12 reports (not counting any report referred to in paragraph (1)(B)) during any calendar year. If the Commission acts on its own motion under this paragraph with respect to a candidate or a political committee, such candidate or committee may obtain judicial review in accordance with the provisions of chapter 7 of Title 5, United States Code.

(b) *Contents of reports.* Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) the full name and mailing address (occupation and the principal place of business, if any) of each person who has made one or more contributions to or for such committee or candidate (including the purchase of tickets for events such as dinners, luncheons, rallies, and similar fundraising events) within the calendar year in an aggre-

gate amount or value in excess of $100, together with the amount and date of such contributions;

(3) the total sum of individual contributions made to or for such committee or candidate during the reporting period and not reported under paragraph (2);

(4) the name and address of each political committee or candidate from which the reporting committee or the candidate received, or to which that committee or candidate made, any transfer of funds, together with the amounts and dates of all transfers;

(5) each loan to or from any person within the calendar year in an aggregate amount or value in excess of $100, together with the full names and mailing addresses (occupations and the principal places of business, if any) of the lender, endorsers, and guarantors, if any, the date and amount of such loans;

(6) the total amount of proceeds from—

(A) the sale of tickets to each dinner, luncheon, rally, and other fundraising event;

(B) mass collections made at such events; and

(C) sales of items such as political campaign pins, buttons, badges, flags, emblems, hats, banners, literature, and similar materials;

(7) each contribution, rebate, refund, or other receipt in excess of $100 not otherwise listed under paragraphs (2) through (6);

(8) the total sum of all receipts by or for such committee or candidate during the reporting period, together with total receipts less transfers between political committees which support the same candidate and which do not support more than one candidate;

(9) the identification of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100,

the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made;

(10) the identification of each person to whom an expenditure for personal services, salaries, and reimbursed expenses in excess of $100 has been made, and which is not otherwise reported, including the amount, date, and purpose of such expenditure;

(11) the total sum of expenditures made by such committee or candidate during the calendar year, together with total expenditures less transfers between political committees which support the same candidate and which do not support more than one candidate;

(12) the amount and nature of debts and obligations owed by or to the committee, in such form as the Commission may prescribe and a continuous reporting of their debts and obligations after the election at such periods as the Commission may require until such debts and obligations are extinguished, together with a statement as to the circumstances and conditions under which any such debt or obligation is extinguished and the consideration therefor;

(13) in the case of an independent expenditure in excess of $100 by a political committee, other than an authorized committee of a candidate, expressly advocating the election or defeat of a clearly identified candidate, through a separate schedule (a) any information required by paragraph (9) stated in a manner which indicates whether the independent expenditure involved is in support of, or in opposition to, a candidate; and (b) under penalty of perjury, a certification whether such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(14) such other information as shall be required by the Commission.

When committee treasurers and candidates show that best efforts have been used to obtain and submit the information required by this subsection, they shall be deemed to be in compliance with this subsection.

(c) *Cumulative reports for calendar year; amounts for unchanged items carried forward; statement of inactive status.* The reports required to be filed by subsection (a) of this section, shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward. If no contributions or expenditures have been accepted or expended during a calendar year, the treasurer of the political committee or candidate shall file a statement to that effect.

(d) *Members of Congress, reporting exemption.* This section does not require a Member of the Congress to report, as contributions received or as expenditures made, the value of photographic, matting, or recording services furnished to him by the Senate Recording Studio, the House Recording Studio, or by an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives and who furnishes such services as his primary duty as an employee of the Senate or House of Representatives, or if such services were paid for by the Republican or Democratic Senatorial Campaign Committee, the Democratic National Congressional Committee, or the National Republican Congressional Committee. This subsection does not apply to such recording services furnished during the calendar year before the year in which the Member's term expires.

(e) *Contributions or expenditures by person other than political committee or candidate.*

(1) Every person (other than a political committee or candidate) who makes contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 during a calendar year shall file with the Commission, on a form prepared by the Commission, a statement containing the information required of a person who makes a contribution in excess of $100 to a candidate or political committee and the information required of a candidate or political committee receiving such a contribution.

(2) Statements required by this subsection shall be filed on the dates on which reports by political committees are filed. Such statements shall include (A) the information required by subsection (b)(9), stated in a manner indicating whether the contribution or independent expenditure is in support of, or opposition to, the candidate; and (B) under penalty of perjury, a certification whether such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate. Any independent expenditure, including those described in subsection (b)(13), of $1000 or more made after the 15th day, but more than 24 hours, before any election shall be reported within 24 hours of such independent expenditure.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all expenditures separately, including those reported under subsection (b)(13), made with respect to each candidate, as reported under this subsection, and for periodically issuing such indices on a timely pre-election basis.

FEDERAL ELECTION CAMPAIGN ACT OF 1979

2 U.S.C. § 432. Organization of political committees

(a) *Treasurer; vacancy; official authorizations.* Every political committee shall have a treasurer. No contribution or expenditure shall be accepted or made by or on behalf of a political committee during any period in which the office of treasurer is vacant. No expenditure shall be made for or on behalf of a political committee without the authorization of the treasurer or his or her designated agent.

(b) *Account of contributions; segregated funds.*

(1) Every person who receives a contribution for an authorized political committee shall, no later than 10 days after receiving such contribution, forward to the treasurer such contribution, and if the amount of the contribution is in excess of $50 the name and address of the person making the contribution and the date of receipt.

(2) Every person who receives a contribution for a political committee which is not an authorized committee shall—

(A) if the amount of the contribution is $50 or less, forward to the treasurer such contribution no later than 30 days after receiving the contribution; and

(B) if the amount of the contribution is in excess of $50, forward to the treasurer such contribution, the name and address of the person making the contribution, and the date of receipt of the contribution, no later than 10 days after receiving the contribution.

(3) All funds of a political committee shall be segregated from, and may not be commingled with, the personal funds of any individual.

(c) *Recordkeeping.* The treasurer of a political committee shall keep an account of—

(1) all contributions received by or on behalf of such political committee;

(2) the name and address of any person who makes any contribution in excess of $50, together with the date and amount of such contribution by any person;

(3) the identification of any person who makes a contribution or contributions aggregating more than $200 during a calendar year, together with the date and amount of any such contribution;

(4) the identification of any political committee which makes a contribution, together with the date and amount of any such contribution; and

(5) the name and address of every person to whom any disbursement is made, the date, amount, and purpose of the disbursement, and the name of the candidate and the office sought by the candidate, if any, for whom the disbursement was made, including a receipt, invoice, or canceled check for each disbursement in excess of $200.

(d) *Preservation of records and copies of reports.* The treasurer shall preserve all records required to be kept by this section and copies of all reports required to be filed by this subchapter for 3 years after the report is filed.

(e) *Principal and additional campaign committees; designations, status of candidate, authorized committees, etc.*

(1) Each candidate for Federal office (other than the nominee for the office of Vice President) shall designate in writing a political committee in accordance with paragraph (3) to serve as the principal campaign committee of such candidate. Such designation shall be made no later than 15 days after becoming a candidate. A candidate may designate additional political committees in accordance with paragraph (3) to serve as authorized committees of such candidate. Such designation shall be in writing and filed with the principal campaign committee of such candidate in accordance with subsection (f)(1) of this section.

(2) Any candidate described in paragraph (1) who receives a contribution, or any loan for use in connection with the campaign of such candidate for election, or makes a disbursement in connection with such campaign, shall be considered, for purposes of this Act, as having received the contribution or loan, or as having made the disbursement, as the case may be, as an agent of the authorized committee or committees of such candidate.

(3) (A) No political committee which supports or has supported more than one candidate may be designated as an authorized committee, except that—

petty cash disbursements shall be maintained in accordance with subsection (c)(5) of this section.

(i) When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of title 26.

§ 434. Reporting requirements

(a) *Receipts and disbursements by treasurers of political committees; filing requirements.*

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

(2) If the political committee is the principal campaign committee of a candidate for the House of Representatives or for the Senate—

(A) in any calendar year during which there is a regularly scheduled election for which such candidate is seeking election, or nomination for election, the treasurer shall file the following reports:

(i) a pre-election report, which shall be filed no later than the 12th day before (or posted by registered or

certified mail no later than the 15th day before) any election in which such candidate is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election;

(ii) a post-general election report, which shall be filed no later than the 30th day after any general election in which such candidate has sought election, and which shall be complete as of the 20th day after such general election; and

(iii) additional quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter: except that the report for the quarter ending December 31 shall be filed no later than January 31 of the following calendar year; and

(B) in any other calendar year the following reports shall be filed:

(i) a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31; and

(ii) a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year.

(3) If the committee is the principal campaign committee of a candidate for the office of President—

(a) in any calendar year during which a general election is held to fill such office—

(i) the treasurer shall file monthly reports if such committee has on January 1 of such year, received contributions aggregating $100,000 or made expenditures aggregating $100,000 or anticipates receiving contributions aggregating $100,000 or more or making expenditures aggregating $100,000 or more during such year: such monthly reports shall be filed no later than the 20th day after the last day of each month and shall be

complete as of the last day of the month, except that, in lieu of filing the report otherwise due in November and December, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year;

(ii) the treasurer of the other principal campaign committees of a candidate for the office of President shall file a pre-election report or reports in accordance with paragraph (2)(A)(i), a post-general election report in accordance with paragraph (2)(A)(ii), and quarterly reports in accordance with paragraph (2)(A)(iii); and

(iii) if at any time during the election year a committee filing under paragraph (3)(A)(ii) receives contributions in excess of $100,000 or makes expenditures in excess of $100,000, the treasurer shall begin filing monthly reports under paragraph (3)(A)(i) at the next reporting period; and

(B) in any other calendar year, the treasurer shall file either—

(i) monthly reports, which shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month; or

(ii) quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter and which shall be complete as of the last day of each calendar quarter.

(4) All political committees other than authorized committees of a candidate shall file either—

(A)(i) quarterly reports, in a calendar year in which a regularly scheduled general election is held, which shall be filed no later than the 15th day after the last day of each calendar quarter: except that the report for the quarter ending on December 31 of such calendar year shall be filed no later than January 31 of the following calendar year;

(ii) a pre-election report, which shall be filed no later than the 12th day before (or posted by registered or certified mail no later than the 15th day before) any election in which the committee makes a contribution to or expenditure on behalf of a candidate in such election, and which shall be complete as of the 20th day before the election;

(iii) a post-general election report, which shall be filed no later than the 30th day after the general election and which shall be complete as of the 20th day after such general election; and

(iv) in any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year; or

(B) monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month and shall be complete as of the last day of the month, except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year.

(5) If a designation, report, or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii) is sent by registered or certified mail, the United States postmark shall be considered the date of filing of the designation, report, or statement.

(6) (A) The principal campaign committee of a candidate shall notify the Clerk, the Secretary, or the

Commission, and the Secretary of State, as appropriate, in writing, of any contribution of $1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution.

(B) The notification required under this paragraph shall be in addition to all other reporting requirements under this Act.

(7) The reports required to be filed by this subsection shall be cumulative during the calender year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward.

(8) The requirement for a political committee to file a quarterly report under paragraph (2)(A)(iii) or paragraph (4)(A)(i) shall be waived if such committee is required to file a pre-election report under paragraph (2)(A)(i), or paragraph (4)(A)(ii) during the period beginning on the 5th day after the close of the calender quarter and ending on the 15th day after the close of the calendar quarter.

(9) The Commission shall set filing dates for reports to be filed by principal campaign committees of candidates seeking election, or nomination for election, in special elections and political committees filing under paragraph (4)(A) which make contributions to or expenditures on behalf of a candidate or candidates in special elections. The Commission shall require no more than one pre-election report for each election and one postelection report for the election which fills the vacancy. The Commission may waive any reporting obligation of committees required to file for special elections if any report

required by paragraph (2) or (4) is required to be filed within 10 days of a report required under this subsection. The Commission shall establish the reporting dates within 5 days of the setting of such election and shall publish such dates and notify the principal campaign committees of all candidates in such election of the reporting dates.

(10) The treasurer of a committee supporting a candidate for the office of Vice President (other than the nominee of a political party) shall file reports in accordance with paragraph (3).

(b) *Contents of reports.* Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and the calendar year, the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;

(B) for an authorized committee, contributions from the candidate;

(C) contributions from political party committees;

(D) contributions from other political committees;

(E) for an authorized committee, transfers from other authorized committees of the same candidate;

(F) transfers from affiliated committees and, where the reporting committee is a political party committee, transfers from other political party committees, regardless of whether such committees are affiliated;

(G) for an authorized committee, loans made by or guaranteed by the candidate;

(H) all other loans;

(I) rebates, refunds, and other offsets to operating expenditures;

(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of title 26;

(3) the identification of each—

(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and date and amount of value of such loan;

(F) person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate

value or amount in excess of $200 within the calendar year, together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate;

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 441a(d) of this title; and

(v) any other disbursements; and

(I) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitation of section 441a(b);

(5) the name and address of each—

(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year

is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by the reporting committee to another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3)(A) of this subsection, together with the date and amount of such disbursement;

(6) (A) for an authorized committee, the name and address of each person who has received any disbursement not disclosed under paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of any such disbursement;

(B) for any other political committee, the name and address of each—

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 441a(d) of this title, together with the date, amount, and purpose of any such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all operating expenditures made by such political committee, together with total operating expenditures less offsets to operating expenditures, for both the reporting period and the calendar year; and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.

(c) *Statements by other than political committees; filing; contents; indices of expenditures.*

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) of this section, and shall include—

(A) the information required by subsection (b)(6)(B)(iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

Any independent expenditure (including those described in subsection (b)(6)(B)(iii) of this section) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24

hours after such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State and shall contain the information required by subsection (b)(6)(B)(iii) of this section indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii) of this section, made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely preelection basis.

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IN THE

Supreme Court of the United States

October Term, 1982

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, *et al.,*
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Question Presented.

Whether both courts below erred in finding from the undisputed facts that there was a reasonable probability that compliance by the political committee for the candidates of the Communist Party at the 1976 presidential election with the provisions of the Federal Election Campaign Act requiring it to record and report the names of contributors would have subjected the latter to threats, harassment or reprisals from government officials or private parties.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

Statement of the Case.

The petitioner, Federal Election Commission (the Commission), seeks review of the judgment of the United States Court of Appeals for the Second Circuit affirming

an order of the United States District Court for the Southern District of New York granting summary judgment in favor of respondents, Hall-Tyner Election Campaign Committee (The Committee), and Frances Bordofsky, its treasurer, in an action by the Commission for alleged violations of §§ 432(c)(2) and 434(b)(2) of the Federal Election Campaign Act (the Act)[1] in the course of the 1976 presidential election campaign.

The Committee was the principal campaign committee for Gus Hall and Jarvis Tyner, the candidates of the Communist Party, USA (the Party), for president and vice-president of the United States at the 1976 election. The Party appeared on the ballot in 19 states and was officially credited with 58,689 votes for its presidential ticket (Pet.[2] 21a, 30a).

The petition for certiorari, pages 2-3, sufficiently describes §432(c)(2) (the recordkeeping requirement) and §434(b)(2) (the reporting requirement). But it is misleading in making it appear in the questions presented and throughout that the relevant reporting requirement was limited to contributions in excess of $200 whereas, in 1976, the date of the alleged violations charged in the complaint, the threshold was $100 (see Pet. 3, n. 2).[3]

On March 5, 1976, the Committee's general counsel rendered it a written opinion that, under this Court's decision in *Buckley v. Valeo*, 424 U. S. 1 (1976), the reporting

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[1]1979 amendments to the Act renumbered these sections as §432(c) and §434(b)(3)(A). See Petition for Certiorari, 3, n. 2. Like the courts below, we use the numbering in effect at the time of the alleged violations.

[2]We so designate the petition for certiorari.

[3]As we later show, *infra*, page 7, the petition makes similarly misleading use of an inapplicable time frame to argue that the evidence of FBI harassment was "remote."

and recordkeeping requirements were unconstitutional as applied to the Committee. Pursuant to this opinion, contributors were advised that they might, if they wished, make their contributions anonymously in which case the Committee would neither record nor report their identities, and the Commission was so advised in a note appended to each Committee report (Pet. 4a).

The proceedings before the Commission and its institution of this action are sufficiently described in the opinion of the Court of Appeals (Pet. 4a-5a).

We reserve for the argument, *infra*, a summary of the proof adduced by respondents in support of their motion for summary judgment. Suffice it to say, at this point, that the petition's statement of the facts scants or misrepresents them where it does not disregard them entirely, and that its summary of the opinions below (Pet. 6-8) is as tendentious as its version of the facts.[4] Had the proof been as portrayed by the Commission, it is inconceivable that four seasoned federal judges could have found it more than sufficient to satisfy the evidentiary standard of *Buckley*: the existence of a reasonable probability that Committee compliance with the reporting and recordkeeping requirements would have subjected its contributors to threats, harassment or reprisals from government officials or private parties.

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[4]Significantly, although the case turns on its facts, the petition is devoid of a single reference to the record which has been transmitted to the Court at respondents' request.

Reasons for Denying the Writ.

The courts below were clearly right in finding from the undisputed facts that there was a reasonable probability that Committee compliance with the reporting and record-keeping requirements would have subjected its contributors to threats, harassment or reprisals from government officials or private parties.

The material facts are undisputed (Pet. 33a). The decisive issue which the petition presents is whether these facts support the finding of the courts below as to the reasonably probable consequences to Committee contributors had it recorded and reported their names as required by the terms of the Act.

The proof adduced by respondents has three facets: evidence of 40 years of FBI intrusion by every conceivable covert means into the affairs of the Party and the lives of its supporters; the existence of a multitude of oppressive anti-communist laws, many of them directed against the Party by name, with which the federal and state statute books are studded, and the affidavits of Committee treasurer Bordofsky and of twelve 1976 contributors to the Committee. In what follows, we examine each of these facets in turn and meet the Commission's effort to misstate, belittle or distort them.

A. FBI harassment.

In resisting respondents' subpoena for the records of its anti-communist operations since 1936, the FBI acknowledged that it had upwards of 26 million pages of

such records in its Washington headquarters alone (affidavit of James W. Awe, pp. 6-7).[3] The nature of the FBI operations which these records reflect was revealed in the Final Report, dated April 26, 1976, of the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, S. Rep. No. 755, 94th Cong., 2d Sess. (the Senate Report). Respondents supplied the District Court with a summary of the pertinent findings of the Senate Report, with appropriate page references (Pet. 26a). The Commission acknowledged in its brief below that judicial notice may be taken of the report and it does not question the accuracy of respondents' summary.

As appears from the summary (exhibit 5 to affidavit of John J. Abt in support of motion for summary judgment, pp. 2-5), the Senate Report made the following findings:

1. Since 1936, the Party, its members and anyone suspected of "being under the influence of" the Party, have been targeted by the FBI for "intelligence investigations" which have "produced intelligence reports and massive files on lawful groups and law-abiding citizens."

2. In the early 1940's the FBI inaugurated a program, later known as CPUSA COINTELPRO, to harrass and disrupt the Party and those suspected of being under its influence. Between 1956 and 1971, 1388 operations were authorized under this program. They included anonymous letters to the employers and spouses of targeted persons to provoke their

[3]This affidavit is included in the record (document No. 10) among the papers which were transferred to the District Court below from the District Court for the District of Columbia where they were originally filed.

discharge or destroy their marriages and falsely and anonymously labelling targeted persons as government informers, exposing them to disgrace and physical violence.

3. The FBI has conducted warrantless electronic surveillance in 15 Party "target categories," ranging from "Communist Party Headquarters" to "Commnist Party Apologist."

4. It has engaged in warrantless break-ins of homes and offices ("black bag jobs") to secure membership and mailing lists.

5. It has infiltrated the Party with undercover informants.

6. It has compiled lists of persons to be apprehended in a national emergency because of their "subversive associations and ideology."

7. It has conducted a mail opening program targeted against citizens professing "pro Communist sympathies."

8. It has harassed targeted persons by instigating IRS audits and investigations of their tax returns.

The Commission would have it appear (Pet. 5) that the only form of Party harassment used by the FBI was the COINTELPRO which, it says, ended in 1971. Based on these premises, the Commission's major complaint against the courts below is that they did not inquire whether "a reasonable probability of harassment *still* exists" (Pet. 16, emphasis supplied) or, as phrased in its questions

presented, "whether there was any evidence of *recent* threats or harassment" (emphasis supplied). The complaint rests on an erroneous time frame for relevant evidence of harassment in this case.

This is a suit for a civil penalty and an injunction on account of alleged violations of the Act in connection with the 1976 election campaign. The issue with respect to FBI harassment, therefore, is its probable effect on contributors to that campaign, not to some subsequent one.[6] Evidence of post-1976 harassment is relevant only insofar as it may cast light on the situation in the critical year. On the other hand, because the chilling effect of harassment lingers on after it has been discontinued, especially where it has been prolonged and severe, the evidentiary standards of *Buckley* include (at 74) evidence of *past* harassment of the organization or its members.

We proceed to examine the evidence of FBI harassment in the light of the applicable time frame.

The affidavit of an FBI special agent submitted in opposition to respondents' subpoena states that his review of the CPUSA COINTELPRO file showed that this program "ceased as of January 1, 1972" (affidavit of William O. Cregar, p. 4). Even assuming that the program, in fact, terminated on that date,[7] it is obvious that the effects of

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[6]All of the cases cited by the Commission (Pet. 16, n. 10) in support of its complaint against the courts below involved actions by political committees of the Socialist Workers Party permanently to enjoin enforcement of disclosure requirements against themselves and future committees. There, of course, the result turned on evidence of current harassment.

[7]The Senate Report found (Book III, p. 12) that the records of post-1971 COINTELPRO operations are located in other files and that "COINTELPRO-type activities may continue today under the rubric of 'investigations.' "

this infamous operation which "sometimes caused serious emotional, economic or physical damage" to the victims (Senate Report, Book II, p. 216) would not evaporate in four years, especially since, as the Court of Appeals observed (Pet. 14a, n. 16), the Senate Report appeared and was publicized in 1976 so that "[t]he potential chill of this program may very well have been at its zenith just as the Committee was soliciting contributions."

Again, compilation of the FBI's so-called "Administrative Index" of alleged subversive individuals to be apprehended in a national emergency was not discontinued until January, 1976, and "is still being maintained" (Cregar affidavit, pp. 4-5). FBI use of the Internal Revenue Service for tax harassment and the CIA mail opening program, conducted in collaboration with the FBI, did not terminate until 1973, and the FBI-National Security Agency cable interception program continued until 1975 (Exhibit 5 to Abt affidavit, pp. 4-5).

While a 1966 FBI directive purported to terminate the use of "black bag jobs" against domestic targets, the directive did not apply to foreign intelligence investigations where, in the opinion of the Department of Justice, they may be properly used (Sen. Rep., Book III, pp. 365, 369). The FBI so designates its investigation of the Party (Cregar affidavit, p. 3).[8]

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[8]Contrary to the Commission's assertion (Pet. 23, n. 14), the Senate Report (*ibid.*) did *not* find that the use of "black bag jobs," even in domestic intelligence matters, was discontinued in 1966, but found evidence of their continuance after that date, as recent revelations have confirmed. See, e.g., letter dated February 19, 1980, from FBI Director William H. Webster to former Attorney General Benjamin R. Civiletti, released to the press July 2, 1980, reporting on his investigation of "black bag jobs" performed in the late 1960's and 1970's.

Finally, nothing in the Senate Report or in the FBI affidavits submitted in opposition to the subpoena remotely suggests that pervasive FBI electronic eavesdropping and surveillance by informers are not still being used in its ongoing so-called foreign intelligence investigation pursuant to an October 1976 directive of former Attorney General Levi (Cregar affidavit, p. 5).[9] Acting under this directive, the FBI by May, 1979, had amassed at least an additional 90,000 pages of investigative records at its headquarters office alone (Abt affidavit, Ex. 13).

As the foregoing analysis demonstrates, the Commission's assertion (Pet. 17) that the finding below was based on FBI practices "which have long been abandoned" was made with deliberate and total disregard for the factual record. The Commission displays a like disregard for the legal effect of the judgment below, which does not immunize the Party "from complying with this important federal statue *forever*" (Pet. 17, emphasis supplied) but only for the 1976 election campaign.

B. Federal and state anti-communist legislation.

The Party and its members have been and are the subjects of a mass of legislation, federal and state, which stigmatizes them as seditious conspirators and subversive foreign agents, threatens them with onerous civil disabilities, and makes Party membership an element in a number of criminal offenses. While §§ 432(c) (2) and 434(b) (2) apply to contributors, not members, *Buckley* points out (at 66) that, "Our past decisions * * * have treated them interchangeably," and *Buckley* does likewise.

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[9]The directive was submitted to the District Court *in camera* under a claim of privilage (Pet. 27a, n. 9).

We turn first to the federal legislation.

The Smith Act, 18 U.S.C. §2385, makes it a crime to conspire to advocate the violent overthrow of the government or to be a member of an organization which so advocates. Between 1948 and 1956, 145 members of the Communist Party were indicted under the conspiracy provisions of that Act. Of these 108 were tried, convicted and sentenced to terms aggregating 418 years; 28 served prison sentences. Caute, *The Great Fear* (N. Y., 1978), page 208. Nineteen persons were indicted under the membership provision, several convicted, and one served a prison sentence. Belknap, *Cold War Political Justice* (Westport, Conn., 1977), pages 262-64.

There have been no Smith Act prosecutions since 1961, following *Yates v. United States,* 354 U. S. 298 (1957), and *Noto v. United States,* 367 U. S. 290 (1961). But the statute has never been declared to be unconstitutional and it remains on the books as an overhanging threat to Party members and adherents.

The Subversive Activities Control Act, 50 U.S.C. §781 *et seq.,* is prefaced by lengthy findings condemning the "world Communist movement" and the "Communist movement in the United States" which is declared to be "a clear and present danger to the security of the United States and to the existence of free American institutions." Section 4 of this statute (50 U.S.C. §783) makes it a crime to conspire to "perform any act which would substantially contribute to the establishment in the United States of a totalitarian dictatorship."

Other provisions of the SACA impose severe criminal and civil sanctions against an organization and its

members when the organization is found by the Subversive Activities Control Board to be a "Communist-action organization." A 1953 Board finding to that effect was followed by prolonged litigation in which most of these provisions were held to be unenforceable or unconstitutional.[10] But the act remains on the books, including the congressional findings and §4, which has never been litigated, criminalizing the precise activity that Congress found the Party and its adherents to be engaged in.

The Communist Control Act, 50 U.S.C. §841 *et seq.*, finds among other things (§841) that the Party "is in fact an instrumentality of a conspiracy to overthrow the Government of the United States" whose members "are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftans." After more of the same, §841 concludes that "the Communist Party should be outlawed." §842 then provides that "whatever rights, privileges, and immunities which have heretofore been granted to said [Communist] part or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated."[11]

Four additional federal laws that impose onerous disabilities on Party members require no comment. 42

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[10]See *Communist Party v. S.A.C.B.*, 367 U. S. 1 (1961); *Communist Party v. United States*, 384 F. 2d 957 (C.A.D.C. 1967); *Albertson v. S.A.C.B.*, 382 U. S. 70 (1965); *Aptheker v. Secretary of State*, 378 U. S. 500 (1964); *United States v. Robel*, 389 U. S. 258 (1967); *Boorda v. S.A.C.B.*, 421 F. 2d 1142 (C.A.D.C. 1968), cert. den. 397 U. S. 1042.

[11]Efforts to enforce §842 have had a mixed reception. *Salwen v. Rees*, 108 A.2d 265 (Sup. Ct., N. J., 1954); *Communist Party v. Catherwood*, 367 U. S. 389 (1961); *Mitchell v. Donovan*, 290 F. Supp. 642 (D. Minn. 1968); *Blawis v. Bolin*, 358 F. Supp. 349 (D. Ariz. 1973). The Act, however, remains in effect.

U.S.C. §2000-e 2(f) makes the members ineligible for the benefits of the equal employment opportunities provisions of the Civil Rights Act. 8 U.S.C. §§ 1451(c) and 1251(a) make naturalized members liable to the revocation of their citizenship, whereupon they may be deported. 42 U.S.C. §1874(d) (2) (A) makes it a crime for a person who is a member of an organization against which a final registration order of the Subversive Activities Control Board is in effect to apply for or use a National Science Foundation Award. And 42 U.S.C. §410(a) (17) excludes from covered employment under the Social Security Act service in the employ of any organization which is subject to such a registration order.

The array of state anti-communist laws is surveyed in the appendix to this brief (*infra*, p. 20). They include provisions denouncing the Party and its members as seditious foreign agents, making it a crime to be a Party member or contributor, requiring members to register with state authorities, making them ineligible for public employment, mandating the teaching of the evils of communism in the public schools and forbidding the advocacy of communism there, denying members the benefits of state fair employment laws and authorizing the denial to them of pharmacy licenses.

As both courts below found (Pet. 13a, n. 15, 26a), the mere presence on the statute books of the federal and state legislation reviewed above provides massive evidence of the "manifestations of public hostility" against the Party, its members and supporters which *Buckley* found (at 74), "may be sufficient" to relieve a minor party from compliance with the Act's disclosure requirements.[12]

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[12]As this Court noted in *Communist Party v. Subversive Activities Control Board, supra*, at 102, "the public opprobrium and obloquy which may attach to an individual listed with the Attorney General as a member of a Communist-action organization is no less considerable than that in * * * *N.A.A.C.P.* and *Bates.*"

But they do more. Many of these laws expose Party members and supporters to a wide variety of drastic civil sanctions. Others make association with the Party an element of various criminal offenses. In recognition of the latter, the Supreme Court has held in an unbroken line of decisions that "mere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege [against self-incrimination]." *Albertson v. Subversive Activities Control Board, supra,* at 77, and cases there cited. The rule of these cases has never been withdrawn or modified.

Association with no other political party entails a like threat.

Disclosure of the names of the Committee's contributors would expose them to a threat of prosecution which *Albertson* held sufficient to support a claim of privilege. To compel the Committee to make a disclosure which presents so substantial a threat of criminal prosecution of its contributors would, to paraphrase *Buckley* (at 71), "deter contributions to the point where [the Committee] could not survive."

The Commission argues (Pet. 19) that because the anti-communist statutes reviewed above have not been invoked "in recent times," there was no reasonable probability of their use against the Committee's 1976 contributors. The opinion of the Court of Appeals should have been sufficient to lay that argument to rest when the Commission advanced it there (Pet. 13a-14a). It may be added by way of illustration that New York's Criminal Anarchy statute, Penal Law §240.15 (former §§ 160-161) was placed in moth balls for some 40 years following the convictions of a number of Communists under it in the 1920's, e. g.,

Gitlow v. New York, 268 U. S. 652 (1925). It was not resurrected until 1964 when it was used to convict a defendant whom the New York Court of Appeals described as a member of a "splinter communist club." *People v. Epton,* 19 N. Y. 2d 496 (1967), cert. den. and appl. dismd. 390 U. S. 29 (1968). It was doubtless with such episodes in mind that *Albertson v. S.A.C.B., supra,* at 77, cited §4 of the Subversive Activities Control Act as an example of a law which presented a sufficient threat of prosecution to support a claim of the privilege although it had not been invoked in the 15 years since its enactment.

C. The affidavits.

In support of their motion for summary judgment, respondents submitted the affidavit of respondent Bordofsky, the Committee treasurer and an experienced Party fund raiser, describing the efforts of herself and others to raise money for the 1976 election campaign. They found, with few exceptions, that those solicited declined to contribute, primarily because of their fear of FBI surveillance and harassment, unless assured that their contributions would remain anonymous (Abt affidavit, Ex. 10). The Commission has never questioned the truthfulness of Bordofsky's statements or explored her credibility by deposition or otherwise.

The Bordofsky affidavit was corroborated by the affidavits of 12 contributors, submitted at the suggestion of the District Court (Pet. 28a, n. 10) after it became apparent that the FBI, on the one hand, would adamantly resist production of the subpoenaed records and, on the other, that they were too voluminous to permit the Attorney General to assert a valid claim of privilege (FBI Memorandum in Reply to Defendants' Memorandum in

Opposition to Subpoena).[13] As the court proposed, the affidavits were submitted *in camera* and copies were supplied to the Commission with the names of the affiants and other identifying information expunged (Pet. 28a). Copies of the expunged affidavits are included in the supplemental record which has been transmitted to the Court.

It appears from the affidavits that each affiant contributed more than $50 to the Committee in 1976. All of the affiants made their contributions in cash and only after receiving the assurance of a representative of the Committee that it would not make a record of their names and would otherwise respect their anonymity. Their insistence on anonymity stemmed from their knowledge of the activities of the FBI and other governmental agencies in harassing the Party and persons known or suspected of being its supporters. They believe that if their names were to appear in the records of the Committee, or if they were to contribute by check, their identities as supporters of the Party would become known to the FBI through an informer or otherwise and that the FBI would use this knowledge to subject them to surveillance and other forms of harassment. The forms of harassment which the affiants fear vary with their individual circumstances and include loss of employment, customers or patients, loss of

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[13] A valid claim of privilege would have required the Attorney General's personal examination of the records. *United States v. Reynolds*, 345 U. S. 1, 8 (1953). The issue of the subpoena was mooted by the grant of summary judgment (Pet. 21a, n. 2). The FBI's conditional offer to produce subpoenaed documents dated subsequent to September 1, 1976 (FBI Memorandum in Reply to Defendants' Memorandum in Opposition, p. 9), referred to by the Commission (Pet. 6, n. 3) was spurious for the reason, among many others, that it would have denied respondents records of FBI harassment during all but two months of the 1976 campaign as well as of all past harassment.

citizenship by a naturalized citizen, and the hostility of their neighbors and associates.[14]

D. The recordkeeping requirement.

The Commission urges (Pet. 20) that whatever the action of the Court with respect to the reporting requirement, the decision below on the recordkeeping requirement should be reviewed. If the latter is permitted to stand, it is argued, the Commission will be denied the means of detecting violations of the Act's $1,000 ceiling on the contribution of a single individual to a Communist Party candidate.

Buckley did not specifically address itself to the First Amendment aspect of the recordkeeping requirement. But the principles it enunciated are as applicable to recordkeeping as they are to reporting on the unique facts of this case.

The Senate Report establishes that the FBI has long been engaged in amassing the names of persons with associational ties with the Party. It has employed informers, "black bag jobs," electronic surveillance and other covert means to garner names from every possible source and has used the information so obtained to list the persons as "subversives," stigmatize them with "a badge of infamy" (*Weiman v. Updegraf*, 344 U. S. 183, 191 [1952]), and otherwise to harass them. Committee records

[14]The Commission complains (Pet. 18) that the courts below failed to inquire whether Committee contributors whose names were recorded and reported suffered any adverse consequences. But plainly, contributors who indicated their willingness to be listed by name did so because they had already been publicly identified as Party members or supporters and hence had nothing to fear from a further disclosure of their associational ties.

of contributors are too rich a reservoir of names to be passed over. It is highly significant that although the subpoena called for FBI records of break-ins, infiltration by informers and electronic surveillance targeted against the Committee (Cregar affidavit, p. 2), the FBI has never disavowed the existence of such records.

The plain fact is that to keep Committee records of the names of contributors is to report those names to the FBI. Under these circumstances, recordkeeping chills and restrains the exercise of First Amendment rights no less than reporting. This is confirmed by the affidavits, all of which speak of the fear of FBI access to the affiant's identity by informers or other covert means if his or her name were to appear in the Committee records. It follows that in the unprecedented circumstances of this case, the principles of *Buckley* are applicable to both forms of disclosure.

The Commission's speculation (Pet. 23, n. 14) that FBI access to Committee records identifying contributors could be circumvented by having its treasurer secrete them is too absurd for comment except to point out that if this device succeeded in making the records unavailable, they would be of no use for enforcement.

The Commission argues at length (Pet. 21-24) that adjudication of *its* right of access to Committee records must await the issuance of a Commission subpoena for them. But the argument misses the point. It is *FBI* access to records that is at issue here. The evidence shows that for more than 40 years the FBI has been ferreting out the names of Party members and supporters by every conceivable covert means so that the threat to First Amendment rights is not remote as it was in *California Bankers*

Association v. Shultz, 416 U. S. 21 (1974), but clear, present and ripe for adjudication.

Finally, the governmental interest in enforcing the limitation on individual contributions to the Committee is insubstantial. "The sole governmental interest that the Supreme Court [in *Buckley*] recognized as a justification for restricting contributions was the prevention of *quid pro quo* corruption between a contributor and a candidate." *Let's Help Florida v. McCrary*, 621 F. 2d 195, 199 (C.A. 5, 1980), quoted with approval in *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, ____ U. S. ____, 102 S. Ct. 434, 438 (1981).

This governmental interest is not served by limiting the size of contributions to Party candidates. For no one in his right mind could hope or expect to buy political favors or influence by contributing to them. Hence, as the District Court found (Pet. 32a-33a) the governmental interest is too slight to justify the abridgement of First Amendment rights that recordkeeping entails in the peculiar circumstances of this case.

Conclusion.

The courts below found, on the one hand, that the governmental interest in Committee compliance with the reporting and recordkeeping requirements was slight and, on the other, that the Party and its adherents are the objects of an unparalleled array of repressive measures and practices, federal and state, that chill the exercise of their First Amendment rights. Adherence to no other political party exposes the adherent to criminal prosecution, severe civil disabilities, stigmatization for disloyalty and FBI harassment, all solely because of his or her associational ties.

Indeed, the Court of Appeals found the evidence of the chilling effect of compliance with the reporting and recordkeeping requirements so compelling that it deemed it appropriate to censure the Commission for pursuing "so vigorously its demand for the names and addresses of the contributors to the Committee" (Pet. 17a).

Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Survey of State Anti-Communist Legislation

This is a survey of state anti-communist legislation in effect in 1976, the year in which the violations of the Act charged in the complaint are alleged to have occurred. The state laws are grouped by subject matter.

1. *Criminal Statutes Relating to Party Membership—*

Ten states have statutes making Communist Party membership illegal.[1] Of these, four make it a crime to contribute to the Party.[2] An additional twenty-four states have criminal statutes against sedition, subversion, "criminal syndicalism," or "criminal anarchism," which make it a felony to advocate the overthrow of the government by force or violence, or to become a member of or assist a group with those aims.[3]

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[1] Arizona: R.S. 13-707; Arkansas: Criminal Code §41-3973; Florida: Title 44, §876.02(5); Indiana: §35-26-2-4; Massachusetts: C. 264, §§ 16A, 17, & 19; Nebraska: §28-748(3); Oklahoma: 21 §1266.4(4); Tennessee: §39-4422; Texas: Tex.R.S. Art. 6889-3A, Sec. 5(4); Washington: §§ 9.81.030 & .083.

[2] Massachusetts: C. 264, §23; Oklahoma: 21 §1266.4(4); Texas: Tex. R.S. Art. 6889-3A, Sec. 5(4); Washington: §9.81.020(4).

[3] Alabama: §13-6-44, *et. seq.;* Alaska: §11.50.010-.040; California: Pen. C.A. §11400, *et. seq.;* Colorado: §§ 18-11-201 & 203; Georgia: §26-2204; Iowa: Title 35, ch. 689.8, *et. seq.;* Kansas: §21-3802; Louisiana: R.S. 14.115; Maine: 17 §3651; Maryland: Art. 85A §§ 2 and 3; Michigan: §§ 750.47, 750.545a, *et. seq.;* Minnesota: §609.405; Mississippi: §97-7-21, *et. seq.;* Montana: §94-7-503; Nevada: §203.115, *et. seq.;* New Hampshire: §648:1, *et. seq.;* New Jersey: 2A:148-16, *et. seq.*, & 2A:148-13, *et. seq.;* New York: Penal Law §240.15; North Carolina: §14-11, *et. seq.;* Rhode Island: §11-43-11, *et. seq.;* South Dakota: §22-8-6, *et. seq.;* Utah: §76-8-901, *et. seq.;* Vermont: Title 13, §3405; Virginia: §18.2-484; Wisconsin: §946.03.

2. *Legislative Findings Concerning the Party's "Subversive" Role*—There have been numerous state legislative findings that the Communist Party is a subversive organization that seeks the overthrow of the government by violent and unconstitutional means.[4]

3. *Statutes Requiring Registration by the Party or its Members*—Seven states have statutes requiring the Party or its members to register.[5] Michigan's version requires anyone making a contribution to the Party to register, pursuant to its provision defining a contributor as a Communist.[6] Two other states, California and South Carolina, have broader registration statutes that do not specifically mention the Party but require "subversive organizations" to register.[7]

4. *Provisions Relating to Public Employment*—Fourteen states have statutes making Party members ineligible

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[4]Arizona: R.S. 13-707(c), 16-205; Arkansas: Criminal Code §41-3972; California: Gov. C.A. §1027.5; Ed. C.A. §7000; Georgia: Preamble of Sedition and Subversive Activities Act, §92A-1203; Indiana: §35-26-2-1, *et. seq.;* Louisiana: R.S. 14:358; Michigan: §752.321; New Mexico: §12-4-1, *et. seq.*, §4-15-1, *et. seq.;* Oklahoma: §1266.1; Tennessee: §39-4421; Texas: Art. 6889-3A, Sec. 1; Washington: §9.81.083; Wyoming: §9-12-103.

[5]Arkansas: Criminal Code §41-3968, *et. seq.;* Delaware: 20 §3501, *et. seq.;* Louisiana: R.S. 14:358, *et. seq.;* Michigan: §752.321, *et. seq.;* New Mexico: §12-4-1, *et. seq.;* Texas: Art. 6889-3; Wyoming: §9-12-101, *et. seq.*

[6]752.322(b).

[7]California: Corp. C.A. §35000, *et. seq.;* South Carolina: §23-29-10, *et. seq.*

for public employment, frequently requiring a non-Communist loyalty oath.[8] An additional fourteen states bar "subversives" from public employment.[9]

5. *State Investigations of the Communist Party*—The Maryland and Georgia legislatures have created the post of a special assistant Attorney General to investigate "Communism."[10] Three states have authorized executive investigations of "subversive activities"[11] and two others have set up legislative investigating committees or commissions.[12]

6. *Bars to "Communist Doctrine" in Schools*—Many States have laws designed to insulate schools and students from so-called "communist doctrine." Six have statutes mandating or authorizing high school courses on the "evils" of Communism (Louisiana), "the dangers and fallacies . . . of Communism," (Nebraska), "Americanism versus Communism" (Florida), or the

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[8] Arizona: R.S. 38-231; California: Gov. C.A. §1028; Ed. C.A. §§ 87735, 88122, 89537 & 87732; Ed. C.A. §§ 44932(k) & 45303, Ed. C.A. §7001; Florida: §876.05 *et. seq.;* Georgia: §89-312, *et. seq.;* Illinois: 127 §166(a) & (b); Indiana: §35-26-2-7; Louisiana: R.S. 14:371; Michigan: §752.328; New York: Civil Service Law §105, Public Affairs Law §35a; North Carolina: §166.A.13; Oklahoma: 51 §36.1 & 2; Texas: Art. 6252-7; Washington: §9.81.060, *et. seq.;* Wyoming: §§ 9-12-107, 102.

[9] Idaho: §59-401; Kansas: K.S. §§ 21-305, 48-917; Maine: 37-A §65; Maryland: 85A §10, *et. seq.;* also Const. Art. XV, §11; Massachusetts: c. 264, §14; Michigan: §30.204; Minnesota: §12.43; Nevada: §§ 281.330, 391.312, 284.425; New Hampshire: §648.12 *et. seq.;* New Mexico: §10-1-12; Ohio: §§ 124.36 & 5915.14; Oregon: §§ 401.160, 182.030 & 236.030; Pennsylvania: 65 P.S. 212, *et. seq.;* 53 P.S. §733; 16 P.S. §4221.4; Wisconsin: §22.16(9)(c).

[10] Georgia: §92A-1204; Maryland: 85A §6.

[11] Michigan: §28.51, *et. seq.;* Mississippi: §45-19-51; New Hampshire: §648:11.

[12] Ohio: §103.31, *et. seq.;* South Carolina: §2-31-10, *et. seq.*

like.[13] California and New Hampshire enjoin teachers from advocating Communism or presenting Communism as preferable to free enterprise.[14] Three states have textbook restrictions: Alabama proscribes textbooks written by members of the Party or a "communist front organization," and Nevada and New York bar "subversive," "seditious" and "disloyal" doctrines.[15]

7. *Additional Miscellaneous Provisions*—The extensive scope of anti-communist legislation is illustrated by the fact that, in addition to the foregoing, there exist many other provisions covering every sphere of activity. A sampling is indicated below:

Arizona, Nevada and Nebraska specifically except members of the Party from the protection of laws forbidding unlawful employment practices.[16]

Mississippi forbids Party members from holding union office, from holding a position with any employer's association dealing with labor relations, and from being a labor relations consultant.[17]

Texas has authorized its Board of Pharmacy to prevent Party members from obtaining or keeping pharmacy licenses.[18]

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[13] Alabama: §16-40-3; Florida: §233-064; Louisiana: R.S. §17.2851; Mississippi: §37-13-13; Nebraska: §79-213(5)(b); New York: Education Law §3204.3(a)(3).

[14] California: Ed. C.A. §8455; New Hampshire: Chapter 191:1.

[15] Alabama: §16-36-10; Nevada: §390.160; New York: Education Law §704.

[16] Arizona: §41-1463G; Nebraska: §48-1109; Nevada: §613.360.

[17] Mississippi: §71-1-49.

[18] Texas: Art. 4542a §12(i).

Party members are ineligible to serve as jurors in New York.[19]

Louisiana, it appears, has attempted to corner the market on such legislation, enacting, *inter alia*, the following provisions: The Louisiana State Library is required to set up a special "Anti-Communist" division.[20] Municipalities have been empowered to pass ordinances banning the sale of products from "Communist" countries.[21] It is a crime to deliver or store "Communist propaganda."[22] Finally, no Louisiana corporation may knowingly have an officer, manager or director who is "subversive."[23]

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[19] New York: Judiciary Law §665-a.

[20] Louisiana: R. S. 25 §17.

[21] Louisiana: R. S. 33 §4789.

[22] Louisiana: R.S. 14 §390, *et. seq.*

[23] Louisiana: R.S. 12 §1041.

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No. 82-198

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents rely upon speculation, much of which was not accepted by the courts below, to support their assertions that they have demonstrated a "reasonable probability" that compelled disclosure of their contributors will subject them to harassment, which is the standard required for exemption from the Act's reporting requirements under *Buckley* v. *Valeo*, 424 U.S. 1, 71, 74 (1976). However, as shown in the Petition (pp. 14-16), record evidence rather than supposition is required to satisfy the burden of proof established in

Buckley. In this Reply Brief, we briefly discuss only the most significant examples of the Committee's continuing failure to acknowledge that evidentiary burden.

1. As the district court found (Pet. App. 27a n.8), the FBI's COINTELPRO disruption program was discontinued at the end of 1971. Respondents concede (Br. 8) that the Internal Revenue Service and Central Intelligence Agency activities it relies upon ceased in 1973, and that the FBI stopped adding names to its "Administrative Index" in January of 1976. Moreover, as noted in the Petition (p. 23 n.14), the FBI instituted a policy against "black bag jobs" [*i.e.* break-ins] to obtain documents in 1966, and the Committee presented no evidence that this policy has been altered.[1] Thus, there is nothing in the record to suggest that there was a "reasonable probability" that the Committee's contributors would have been subjected to any of these actions, all of which were—so far as the record in this case indicates—discontinued before the Committee began soliciting contributions.

The only government activity relied upon by the Committee which the record indicates continued after the Committee began its solicitations, is the FBI's foreign intelligence investigation of the Communist Party. Since the district court declined to rule on whether, or to what extent, the FBI must comply with the Committee's subpoena, the only evidence in the record about that investigation is the affidavit of the Assistant

[1] While the Senate Report indicated that a few isolated break-ins occurred after the FBI established this policy, there is nothing to indicate that any of them involved the Communist Party or its supporters. The courts below did not find to the contrary.

Director of the FBI's Intelligence Division affirming that it has been conducted in full accordance with all applicable legal standards (Cregar affidavit, pp. 3-4).[2] This uncontradicted affidavit is corroborated by the Committee's failure to present any evidence of unlawful harassment of its supporters since COINTELPRO ended.

In fact, unlike the Committee, the district court accepted the fact that the ongoing investigation has been conducted lawfully (Pet. App. 27a), but erroneously concluded that the existence of a lawful investigation justified an exemption from the Act's disclosure provision. There is nothing in *Buckley* v. *Valeo*, *supra*, to support the conclusion that lawful government activities, not shown to have involved any threats or harassment, would satisfy the evidentiary burden established in that case for permitting an exemption from the statutory reporting requirement.[3] Such a rule would have the anomalous effect of freeing all candidates and parties who are under active investigation for suspected

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[2] Contrary to the Committee (Br. 17), the FBI's mere failure to "disavow the existence" of the records subpoenaed by the Committee does not indicate that there are such records. Since the district court failed to rule on the FBI's motion to quash the Committee's subpoena, the FBI had no occasion to search its files to determine whether such records exist.

[3] In *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972), this Court rejected the contention that an unconstitutional "chilling effect" could be demonstrated from the mere fact that the government is investigating certain groups and individuals, even if those individuals fear that the government "may at some future date misuse the information in some way that would cause direct harm to [them]."

illegal or corrupt activities from complying with the Act's provisions designed to protect the electoral process from corruption.

2. The Committee places heavy reliance upon a list of federal and state statutes which assertedly demonstrate "public hostility" to supporters of the Communist Party, and constitute a "threat of prosecution" against contributors whose support of the Committee becomes known (Br. 9-14, 20-24). However, these statutes were enacted decades ago during the McCarthy era, and have long since fallen into disuse. The Committee has been unable to cite a single case in which anyone has been subjected to liability under any of these statutes since 1961, and there has been no attempt to utilize them in many years, even against the Party's publicly active members. The long-standing nonenforcement of these statutes represents "'tougher and truer law than the dead words of the written text.'" *Poe* v. *Ullman*, 367 U.S. 497, 502 (1961). In these circumstances, the mere listing of these statutes does not satisfy the requirement of *Buckley* v. *Valeo* that a "reasonable probability" of harassment of contributors be demonstrated by record evidence. *See* Petition, pp. 14-20.[4]

In fact, any attempt to prosecute individuals under any of these statutes because they contributed to the Committee would face an insurmountable constitutional barrier. Thus, it is not only voluntary governmental nonenforcement which assures that there is no reason-

[4] Nor do these statutes, the product of congressional action in the 1950's and early 1960's, evidence popular animus against the Party in the 1970's and 1980's.

able probability of the Committee's contributors being penalized under these statutes; "the First Amendment ... restricts the ability of the State to impose liability on an individual solely because of his association with another...." *NAACP* v. *Claiborne Hardware Co.*, ___ U.S. ___, 102 S.Ct. 3409, 3429 (July 2, 1982).

> "[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization ... The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals and a specific intent to further those illegal aims."

Id., quoting Healy v. *James*, 408 U.S. 169, 185-186 (1973). While the statutes cited by the Committee might well have some constitutionally valid applications, this well settled constitutional principle would clearly preclude the imposition of any civil or criminal liability upon individuals who have done nothing more than contribute money to the Communist Party's lawful presidential campaign. This Court has always been alert to protect individuals "in sympathy with the legitimate aims" of the Party from being punished in any way for supporting the Party's "lawful and constitutionally protected purposes...." *Noto* v. *United States*, 367 U.S. 290, 299-300 (1961), *quoted in Aptheker* v. *Secretary of State*, 378 U.S. 500, 511-512 (1964), *and in NAACP* v. *Claiborne Hardware Co., 102 S.Ct at 3429. See also, e.g., Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 447-450 (1974); *United States*

v. *Robel*, 389 U.S. 258, 265-266 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11, 15-19 (1966); *DeJonge* v. *Oregon*, 299 U.S. 353, 364 (1937).[5]

3. Contrary to the Committee's assertion (Br. 16), this Court did address the challenge to the Act's recordkeeping requirement in *Buckley* v. *Valeo*, 424 U.S. at 84. As demonstrated in the Petition (pp. 20-23), in *Buckley* the Court cited *California Bankers Assn.* v. *Schultz*, 416 U.S. 21 (1974) to affirm the conclusion of the court of appeals that a first amendment challenge to the Act's recordkeeping requirement cannot be raised in advance of an attempt to compel disclosure of the records.

Even though no one has yet sought to compel disclosure of its records, the Committee argues that its first amendment challenge to the Act's recordkeeping provision is not premature because it should be assumed that the FBI will obtain its records by burglarizing the Committee's offices (Br. 16-18). However, as noted *supra*, p. 2, there is nothing in the record to support the Committee's speculation that the FBI has conducted break-ins to obtain documents from the Commu-

[5] The only case cited by the Committee to support its theory that these long ignored statutes could be resurrected against its contributors is *People* v. *Epton*, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9, 227 N.E. 2d 829 (1967), *cert. denied and appeal dismissed*, 390 U.S. 29 (1968), which involved a conviction for attempting to incite imminent violence during the 1964 Harlem riots, including soliciting individuals to murder police officers. "It is clear that 'fighting words'—those that provoke immediate violence—are not protected by the First Amendment." *NAACP* v. *Claiborne Hardware Co.*, 102 S.Ct. at 3433. There is no indication that Epton's association with a communist group played any part in his conviction.

nist Party since it altered its policy on break-ins in 1966, ten years before the Committee was formed. The court of appeals refrained from adopting such blatant speculation, relying instead upon the possibility that the Commission might seek to audit the Committee's records (Pet. App. 16a). Nor did the district court speculate about the possibility of FBI break-ins, relying instead upon the assumption that the records might be obtained by possible informants within the Committee (Pet. App. 31a).[6] In short, the court of appeals' holding is legally erroneous, as shown in the Petition (pp. 20-25), and the Committee's different theory fails for lack of evidence, even if it had been legally sound.[7]

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[6] As shown in the Petition (pp. 22-23 n.14), there is no evidence to support the district court's assumption that there are informants within the Committee; disclosure to mere informants can be forestalled in any event simply by maintaining the records in a secure place. Of course, contrary to the Committee's suggestion (Br. 17), securing the records from disclosure to unauthorized personnel within the Committee would not prevent the Commission from seeking to obtain access to them by legal process.

[7] In *California Bankers Assn.* v. *Schultz*, 416 U.S. at 55-57, this Court found the first amendment challenge to a recordkeeping statute to be premature in the absence of a formal attempt to compel disclosure, despite the existence of a widespread practice of permitting government agents informal access to such records. 416 U.S. at 56 n.26.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition, the Court should issue a *writ* of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit and consider this case in conjunction with *Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776, *prob. juris. noted*, ___ U.S. ___, 102 S.Ct. 968 (Dec. 14, 1981).

Respectfully submitted,

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